85-1731

Supreme Court, U.S.
FILED
APR 15 1986
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, On Behalf Of Themselves And On Behalf Of The Class Of All Sales Representatives Of The Defendants in the Counties of Wayne, Macomb and Oakland,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTION PRESENTED

After an employer and a union have reached a good faith impasse in collective bargaining, the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 151 *et seq.*, permits the employer, as a self-help economic weapon, to unilaterally implement new employment terms consistent with its final bargaining offer. The question presented is whether, under the federal preemption doctrine, those new employment terms supersede individual state law implied contract rights created prior to the employees' selection of a union.

PARTIES TO THE PROCEEDING

The original parties to the proceeding are reflected in the caption. Subsequently, John Robbins withdrew as a party-plaintiff and Dennis McManus, Franklin Martin, and Ronald Demeter were added as party-plaintiffs. Class certification was not requested.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioners, Automobile Club of Michigan, *et al.* ("Auto Club"), respectfully pray that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered on November 5, 1984. That decision became final for the purpose of review by this Court on January 15, 1986 when the Michigan Supreme Court denied petitioners' application for leave to appeal.

OPINIONS BELOW

The January 15, 1986 order of the Michigan Supreme Court is reported at 424 Mich. 867 (1986). A. 1-2. The decision of the Michigan Court of Appeals is reported at 138 Mich. App. 488 (1984). A. 3-17. Prior thereto, on April 12, 1983, the Michigan Court of Appeals had granted the Auto Club's application for leave to appeal a certified decision (A. 18-19) of the Wayne County (Mich.) Circuit Court. The Circuit Court's decision is not reported and is reprinted at A. 20-38.

JURISDICTION

The decision of the Michigan Court of Appeals issued on November 5, 1984 and became final, for the purpose of review by this Court, when the Michigan Supreme Court denied petitioners' application for leave to appeal on January 15, 1986. See *Belknap* v. *Hale*, 463 U.S. 491, 497 n. 5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

The relevant provisions of the NLRA are set forth in the Appendix at A. 39.

STATEMENT OF THE CASE

The respondents are former sales representatives of the Auto Club. Considerably after the commencement of their employment, as the result of a National Labor Relations Board ("NLRB") election, the Michigan AAA Sales Association (the "Union") became their exclusive bargaining representative. A. 6. After certification of the Union, the Auto Club and the Union met numerous times to negotiate a collective bargaining agreement. A. 7. The Union's membership rejected the Auto Club's final offer in July, 1981. A. 7. As a result of this good

faith impasse in the negotiations, the Auto Club, as permitted under the NLRA, unilaterally implemented its final offer[1] on September 1, 1981. A. 7. One aspect of that final offer and, indeed, the central issue that had separated the parties during negotiations, was minimum production standards. Under those standards, a sales representative received an oral warning for failing to meet the minimum level in a particular month, followed in subsequent months by a written warning, probation, and termination/demotion if the individual failed to fulfill the standards in four consecutive months. In January 1982, 40 of 570 commissioned sales representatives, after receiving such progressive discipline, were terminated for failing to comply with the production standards. A. 7.

Neither the respondents nor their Union filed charges with the NLRB alleging that implementation of the employer's final offer constituted improper bargaining or alleging that either the adoption or enforcement of the standards was otherwise an unfair labor practice under the NLRA. Instead, respondents filed a state court class action on behalf of all employees represented by the Union. Predicated on *Toussaint* v. *Blue Cross and Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980),[2] they claimed that the unilateral implementation and enforcement of the minimum standards violated an alleged implied contract not to terminate without just cause created

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[1] See, *e.g.*, *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59 (1964).

[2] In the landmark *Toussaint* decision, the Michigan Supreme Court vitiated the common law employment at will doctrine. The court held that "employer statements of policy," whether oral or written, "can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee. . . . No pre-employment negotiations need take place and the parties' minds need not meet on the subject. . . ." 408 Mich. at 613-615, 292 N.W.2d at 892.

prior to their selection of the Union. A. 7. The Wayne County Circuit Court denied the Auto Club's motion that the NLRA preempted state court jurisdiction, but certified the preemption question to the Michigan Court of Appeals. A. 18-19.

The Court of Appeals thereafter granted leave to appeal and affirmed. A. 6. The court framed the issue as "one of conflict between defendants' claim that implementing their final offer, which included the minimum performance standards, was an integral part of the collective bargaining process and plaintiffs' claim that the implementation of the minimum production standards was a breach of plaintiffs' pre-existing employment contracts under state law." A. 9. Based on its analysis of various decisions of this Court, the court concluded that the employer's right "to implement its final offer must be seen as limited by the employer's common-law duty to honor its contracts of employment" notwithstanding the "incidental effect on the collective-bargaining process." A. 15. The Michigan Supreme Court subsequently declined review. A. 1-2.

REASONS FOR GRANTING THE WRIT

This Court has heretofore been sensitive to potential state law incursions upon free collective bargaining. See, *e.g., Golden State Transit Corp.* v. *City of Los Angeles,* ____ U.S. ____, 54 U.S.L.W. 4329, 63 Daily Labor Report, p. D-1 (BNA, 1986); *Belknap* v. *Hale,* 463 U.S. 491 (1983). The instant case presents a similar state intrusion and concomitant dislocation of the federal labor-management relations structure. Michigan is only one of a growing number of states that have eroded the traditional employment-at-will doctrine by adopting an expansive view of contract principles in the employment context. If unionized employees in these states may utilize such state law contractual rights to preclude an employer's use of an economic weapon permitted by the NLRA, the balance of economic power in labor disputes will be seriously altered. This Court

should determine whether that admitted interference, characterized by the court below as an "appropriate accommodation" of federal and state law (A. 15), was the accommodation intended by Congress.

A. The basic purpose of the NLRA is to preserve interstate labor peace (29 U.S.C. § 151) by "establishing an equitable process for determining terms and conditions of employment." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. ____, 85 L.Ed.2d 728, 749 (1985). " 'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.' " *Golden State Transit Corp., supra*, 63 Daily Labor Report at D-4, quoting *New York Tel. Co.* v. *New York Dept. of Labor*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting). The 1947 Taft-Hartley amendments to the NLRA were adopted to effectuate this Congressional intent.[3] These amendments includ-

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[3] The amendments were necessary, in the words of Senator Taft, the bill's co-sponsor, because "the weight in collective bargaining negotiations is all on the side of labor leaders . . . [and] there was no way in which any court could revise injustices perpetrated by the National Labor Relations Act." 93 Cong. Rec. 3829, 3835 (1947). As stated in the written Report accompanying Senator Taft's bill, "the administration of the National Labor Relations Act itself ha[d] tended to destroy the equality of bargaining power necessary to maintain industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess. 2. The bill was "predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining." *Id.* Senator Taft stated:

> [O]ur aim should be to get back to the point where, when an employer meets with his employees, they have substantially *equal* bargaining power, so that neither side feels that it can make an unreasonable demand and get away with it.
>
> * * *
>
> If there is reasonable *equality* at the bargaining table, I believe that there is much more hope for labor peace.

Footnote continued on following page.

ed enactment of Section 8(d) of the Act to define the phrase "good faith bargaining." Section 8(d) requires the parties to meet and bargain in good faith over all terms and conditions of employment; it specifically provides, however, that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." A. 39. It was thus "recognized from the beginning that agreement might in some cases be impossible . . . leaving the results of the contest to the bargaining strengths of the parties . . . [A]n employer or a union [may] . . . rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 103, 108, 109 (1970). Unilateral implementation of the employer's final offer is a principal economic weapon of self-help the employer retains once good faith negotiations have exhausted the prospects of reaching agreement. Unions, aware of this significant power, are induced to compromise their demands prior to reaching impasse in the same manner as employers, faced with a possible strike, are encouraged to compromise. This ability to "institute unilaterally [new] working conditions" is thus an important employer "economic weapon" necessary "to counterbalance the employees' power of strike." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316 (1965).

Footnote continued from preceding page.

* * *

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on *free* collective bargaining.

93 Cong. Rec. 3829, 3835 (1947) (emphasis added). Senator George, a proponent of the 1935 NLRA, similarly stated that the 1935 Act "was a very one-sided piece of legislation . . . [If] we are to bring about any degree of balance in the unbalanced condition which has existed for almost 12 years, now is the time to do it." 93 Cong. Rec. 7523, 7536 (1947).

Where, as here, an economic weapon available to a party in a labor dispute has been interfered with by state law, "the crucial inquiry" then becomes a determination as to whether exercise of such state authority "'frustrate[s] effective implementation of the Act's processes.'" *Lodge 76, I.A.M.* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 147-48 (1976) ("*Machinists*"), quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969). The resolution of this "crucial inquiry" in the instant case warrants review by this Court.

The Michigan courts deemed the admitted interference with collective bargaining resulting from the application of state contract law to be permissible because it was merely "incidental" and was occasioned by a "neutral" state law. Neither rationale comports with the decisions of this Court. The fact that state regulation may only be "incidental" is irrelevant. As this Court recently observed, "[t]he idea that state action may be upheld under such circumstances is part of the *Garmon* analysis," a preemption analysis wholly distinct from the *Machinists* principles applicable herein. *Golden State Transit Corp., supra*, 63 Daily Labor Report at D-3 n. 8. This Court has repeatedly recognized that "a particular activity might be 'protected' by federal law not only when it fell within § 7 [of the NLRA], but also when it was an activity that Congress intended to be 'unrestricted by *any* governmental power to regulate' because it was among the permissible 'economic weapons in reserve . . . .'" *Machinists*, 427 U.S. at 141, quoting *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 488-89 (1960) (emphasis added). "[S]elf-help is, of course, also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be *unregulable* . . . [t]he State may not prohibit the use of such weapons or add to an employer's federal legal obligations in collective bargaining any more than in the case of employees. . . ." *Machinists*, 427 U.S. at 147 (emphasis added). See also *Teamsters Union* v. *Morton*, 377 U.S. 252, 258-259 (1964).

The fact that state regulation is "neutral" as opposed to "non-neutral" is similarly irrelevant. As noted by this Court in *Golden State Transit Corp.*, "preemption analysis is not affected by the fact . . . that [a party has] acted through . . . a general law." 63 Daily Labor Report at D-2 n. 5. In drawing such a distinction the Michigan Court of Appeals improperly relied on a concurring opinion of Mr. Justice Powell in *Machinists*. A. 14-15. As Mr. Justice Powell thereafter observed in his dissenting opinion in *New York Telephone Co.*, "pre-emption must turn not on the generality of purpose or applicability of a state law, but on the effect of that law when applied in the context of labor-management relations." 440 U.S. at 558. *New York Telephone* demonstrates that state law interference with collective bargaining is permitted only where "Congress ha[s] decided to tolerate" the intrusion. 440 U.S. at 546. See also *Metropolitan Life Ins. Co.* v. *Massachusetts, supra*, 85 L.Ed.2d at 748, 752 (1985) (state law which neither "alters the balance of power between the parties to the labor contract" nor interferes with "collective bargaining protected by the NLRA" is not preempted). As in *Golden State*, respondents have "pointed to no evidence of such congressional intent with respect to the conduct at issue in this case." 63 Daily Labor Report at D-3.

B. When the respondents invoked federal law by selecting the Union, they delegated to the Union the authority to act as their exclusive bargaining agent. As a result of that selection, they thereby abandoned their right to individually negotiate changes in their employment contracts. The legal framework for such negotiations shifted from traditional common law principles to the NLRA and the federal collective bargaining process. Indeed, because the NLRA "ensures that employees as a group could express their opinions and exert their combined influence over the terms and conditions of employment," (*H.K. Porter, supra*, 397 U.S. at 103), the Auto Club was

expressly prohibited, by virtue of Section 9(a) of the Act (A. 39), from negotiating individually with the respondents or any other members of the bargaining unit. The Auto Club was required instead to negotiate within the collective bargaining framework chosen by the employees. Now, however, some of those employees, the respondents, seek to repudiate that statutorily mandated federal process merely because it worked to their disadvantage.

The final offer implemented by the Auto Club as the end process of collective bargaining involved production standards. If the implementation of those standards can be collaterally attacked under state law, pre-union implied contractual rights could similarly be utilized to vitiate a wide variety of other common unilateral changes that are permissible employer self-help measures: a reduction in wages or benefits after impasse,[4] discontinuing strikers' insurance premiums,[5] contracting out all or a portion of the business,[6] or even hiring permanent strike replacements to maintain production.[7] In all of these situations, under the decision below, while a union could strike or engage in other concerted pressure to obtain its demands, the employer's ability to exercise its corollary self-help weapons would be thwarted by the pre-existing contract rights of the employees in the bargaining unit.

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[4] Such reductions in pay are an increasingly frequent phenomena. In 1985, for example, approximately three percent of negotiated first year wage settlements involved a reduction in pay. *BLS Review of Settlements: 1985*, reprinted in Collective Bargaining Negotiations and Contracts, 18:839 (BNA, 1986).

[5] See *Utility Workers* v. *Boston Edison Co.*, 77 L.R.R.M. 2495 (D. Mass. 1971); *Ace Tank and Heater Co.*, 167 N.L.R.B. 663 (1967); *Knickerbocker Plastic Co., Inc.*, 104 N.L.R.B. 514 (1953), *enf.*, 218 F.2d 917 (9th Cir. 1955).

[6] *Southern California Stationers*, 162 N.L.R.B. 1517, 1537 (1967); *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359 (1965), *aff'd.*, 355 F.2d 842 (D.C. Cir. 1966); *N.L.R.B.* v. *Abbott Publishing*, 331 F.2d 209 (7th Cir. 1964).

[7] *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

Under the view of the Michigan courts, even where an employer's actions conflicted with the pre-union contract rights of a single employee in a bargaining unit of thousands, that employee's contract rights would still prevail. Since there would be no way to ascertain in advance which employees, if any, had implied contract rights that would be impaired by the employer's unilateral action, the employer must, under the view of the Michigan courts, either accept the union's demands or, at its peril, exercise its NLRA self-help rights and face a multitude of employee breach of state contract lawsuits. Juries on a case-by-case basis would have to decide whether there were any such rights and, if so, whether those rights have been impaired.[8] To allow the legality of a bargaining weapon to hinge on a jury's interpretation of the rights running between the employer and each individual in the bargaining unit instills substantial uncertainty in bargaining relationships.

The decision below also disregards Congress' desire to structure a "comprehensive national labor law" (*Amalgamated Assoc. of Street Employees* v. *Lockridge,* 403 U.S. 274, 286 (1971)) to obtain " 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' " *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971), quoting *Garner* v. *Teamsters Union,* 346 U.S. 485, 490 (1953). In recent years many states have radically changed

[8] See *Boynton* v. *TRW, Inc.*, 781 F.2d 555, 560-61 (6th Cir. 1986) ("The *Toussaint* court recognized . . . that there was a risk that courts and juries would in effect become the ultimate authority in employment decisions. Any discharged employee can testify after the fact that oral statements or company practices were construed by him as establishing a policy of discharge only for cause; layoffs only according to seniority or ability, as may appear to be advantageous to the employee at the time; or not to take any action with which the employee might find himself dissatisfied. Such possible effects of the *Toussaint* holding were of concern to the dissenting Justice in that case, and frankly to the members of this Court.").

their view of the law of employment contracts. Although Michigan's "sweeping" *Toussaint* decision may represent "[t]he furthest step any court has taken[,]"[9] other states have permitted employees to similarly invoke broad implied contract theories[10] or assert an express contract based on, for example, the policies contained in an employee handbook.[11] Conversely, however, other state courts have rejected these same theories because of the absence of either consideration, definiteness or mutuality.[12] Still other state courts have circumvented these requirements by allowing recovery on a theory of promissory estoppel[13] or a covenant of good faith and fair dealing.[14] There is, in short, a wide divergence as to the availability of state law contract remedies and their corollary impact upon the collective bargaining process. If the decision below is allowed to stand, juries, not the NLRB, will become the final arbiter as to whether, based upon the status of that state's law, an employer

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[9] Lopatka, Kenneth T., "The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's," *The Business Lawyer*, Vol. 40, p. 19 (Nov. 1984).

[10] See, *e.g.*, *Pugh* v. *See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (implied contract based upon length of employment, oral assurances, past promotions, and personnel policies).

[11] See, *e.g.*, *Mobil Coal Producing, Inc.* v. *Parks*, 704 P.2d 702 (Wyo. 1985); *Southwest Gas Corp.* v. *Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); *Forrester* v. *Parker*, 93 N.M. 781, 606 P.2d 191 (1980); *Jackson* v. *Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977).

[12] See, *e.g.*, *Pine River State Bank* v. *Mettille*, 333 N.W.2d 622 (Minn. 1983); *Muller* v. *Stromberg Carlson Corp.*, 427 So.2d 266 (Fla. Dist. Ct. App. 1983); *Johnson* v. *National Beef Packing Company*, 220 Kan. 52, 551 P.2d 779 (1976).

[13] See, *e.g.*, *Ravelo* v. *County of Hawaii*, 66 Haw. 194, 658 P.2d 883 (1983).

[14] See, *e.g.*, *Milford* v. *de LaSala*, 666 P.2d 1000 (Alaska 1983); *Gates* v. *Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Cleary* v. *American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980).

permissibly exercised its NLRA economic self-help measures in response to a good faith bargaining impasse. Review by this Court is necessary, therefore, to resolve a recurrent question of federal preemption which threatens to severely dislocate national labor policy.

C. Review is also warranted to provide needed guidance on the proper interpretation of this Court's decisions in *J.I. Case* v. *N.L.R.B.*, 321 U.S. 332 (1944), and *Belknap* v. *Hale*, 463 U.S. 491 (1983).

In *J.I. Case*, the Court held that an employer could not rely on individual contracts existing prior to unionization to avoid negotiating with a union. The Court's dicta that individual contracts "*may* be held to govern" if negotiations are deadlocked or delayed (321 U.S. at 337 (emphasis added)) was relied upon by the Michigan Court of Appeals as authority for the sweeping proposition that "individual contract rights are not extinguished until the parties enter into a valid collective-bargaining agreement." A. 17. That proposition goes too far. *J.I. Case*, after all, predates both the 1947 Taft-Hartley amendments enacted to equalize the unbalanced state of collective bargaining and the good faith impasse rule subsequently adopted by the NLRB and the courts. *J.I. Case* was also issued prior to the recent proliferation of cases according individual employees broad implied contract rights. Moreover, the *J.I. Case* Court emphasized that "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor . . . to forestall bargaining." 321 U.S. at 337. At most, therefore, the Court's dicta indicates that, pending the completion of the negotiating process, up to the point of agreement or a bona fide impasse, individual rights "may be held to govern." This is an entirely different situation than the present case where implied contract rights were held to supersede the *results* of the bargaining process.

The decision below also misinterpreted *Belknap*. The conflict between state and federal law involved in *Belknap*[15] does not, as the Michigan Court of Appeals determined, represent a "similar accommodation" of the parties' rights. A. 15. To the contrary, the striker replacements in *Belknap* were "innocent third parties" (463 U.S. at 500) whose interests were antagonistic to those of the unionized strikers and their bargaining agent. See *Golden State Transit Corp., supra*, 63 Daily Labor Report at D-3 n. 7. Here, by contrast, the respondents' interests throughout the bargaining process were identical to the interests of their union. Having opted to pursue the federal collective bargaining process, the respondents elected to obtain either the fruits of that process or risk a change in their employment conditions if an impasse was reached as the

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[15] Unlike the instant case, allowing the striker replacements in *Belknap* to sue in state court did not create a conflict between state and federal law. As Mr. Justice Blackmun observed, "state law enforcement of promises of permanent employment through damage awards for breach of contract and misrepresentation is consistent with the nature of the federal weapon itself." 463 U.S. at 520 n. 4 (Blackmun concurring). The *Belknap* striker replacements complained that their employer failed to fulfill a commitment to give them permanent jobs regardless of the outcome of the strike. Under federal law, an employer is entitled to permanently replace employees on strike in response to economic conditions (*N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)), but employees on strike in response to unfair labor practices may not be permanently replaced. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1957). Thus, if the strike was economic, the employer was permitted under federal law to make and enforce unconditional commitments to the strike replacements and he could lawfully refuse to displace the replacements to make room for the returning economic strikers. Conversely, if, as in *Belknap*, the strike was in response to employer unfair labor practices, then federal law did not permit the employer to make such promises in the first place. In contrast, state enforcement of the alleged contract rights of the instant respondents would directly and substantially thwart the "federal weapon" of unilateral implementation of the employer's final collective bargaining offer.

result of the rejection of the Auto Club's final offer. Respondents cannot have it both ways: they should not be allowed to select a union representative and, then, once a collective bargaining impasse is reached, disown union representation and seek comfort in pre-union state contract remedies. The respondents, moreover, had a substantial remedy under the NLRA. They would have been entitled to reinstatement with full back pay if the Auto Club committed an unfair labor practice by bargaining in bad faith or by failing to exhaust the bargaining process prior to implementing its final offer. *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962); 29 U.S.C. §160(c). A. 39. These federal rights, rather than the state remedies permitted by the decision below, represent the accommodation established by Congress.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of January in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

76341

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, on behalf of themselves and on behalf of the class of all Sales Representatives of the defendants in the Counties of Wayne, Macomb, and Oakland,

Plaintiffs-Appellees,

v

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Defendants-Appellants

SC: 76341
CoA: 66805 (138 MA 488)
LC: 82-203440-CZ

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 15th day of January in the year of our Lord one thousand nine hundred and eighty-six.

CORBIN R. DAVIS, Clerk.

ROBERTS v AUTOMOBILE CLUB OF MICHIGAN

Docket No. 66805. Submitted February 22, 1984, at Detroit. —Decided November 5, 1984.

Plaintiffs, Clifford Roberts, Stanley Snyder and five others, were employed as commission sales representatives by defendants, which are five separate corporations acting under the umbrella of the Automobile Club of Michigan. Plaintiffs had been hired prior to the certification of the Michigan AAA Sales Association as the collective-bargaining representative of all of defendants' commission sales representatives. Defendants and the union attempted to negotiate a collective-bargaining agreement. One of the issues during negotiation was defendants' proposal to adopt minimum production standards, pursuant to which a sales representative who failed to reach the minimum standard would receive warnings, probation, and finally termination. When the parties failed to reach an agreement defendants declared an impasse and then implemented the minimum production standards. Four months later, several of defendants' sales representatives, including plaintiffs, were discharged pursuant to the production standards and were offered lower-paying salaried positions. Plaintiffs brought an action in Wayne Circuit Court seeking injunctive relief and damages, claiming that they each had an oral employment contract in which defendants agreed not to demote or discharge the plaintiffs without just cause, and that defendants had breached these contracts. Defendants moved for accelerated judgment.

REFERENCES FOR POINTS IN HEADNOTES

[1] 73 Am Jur 2d, Summary Judgment § 36.

[2, 5, 6] 48A Am Jur 2d, Labor and Labor Relations §§ 1727, 1729, 1735.

[3] 48 Am Jur 2d, Labor and Labor Relations § 966.

[4] 48 Am Jur 2d, Labor and Labor Relations § 1081.

[6] 48 Am Jur 2d, Labor and Labor Relations §§ 1070, 1071.

claiming that the National Labor Relations Act preempted state court jurisdiction over the matter. The trial court, William Leo Cahalan, J., held that jurisdiction was not preempted and denied the motion. Defendants appealed by leave granted. *Held:*

1. State regulations and causes of action are preempted by the National Labor Relations Act if they concern conduct which is actually or arguably either prohibited or protected by the act or conduct which Congress intended to be unregulated and left to the free play of economic forces.

2. The issues which would be decided by the state court or by the National Labor Relations Board would be different in this case. The state court would decide whether there was an implied employment contract and, if so, whether it was breached. The NLRB would decide whether defendants' unilateral implementation of the production standards was a violation of their duty to bargain and whether a genuine impasse had been reached. The state interests in adjudicating contractual rights outweigh any possible interference with the federal labor laws which might result from permitting the action for breach of contract to proceed.

3. Individual contract rights are not extinguished until the parties enter into a valid collective-bargaining agreement. The plaintiffs' breach of contract action may proceed in the circuit court.

Affirmed.

1. JUDGMENTS—ACCELERATED JUDGMENT.

All well-pled allegations in the complaint are to be accepted as true and construed most favorably to the plaintiff when considering a defendant's motion for accelerated judgment (GCR 1963, 116).

2. LABOR RELATIONS—FEDERAL PREEMPTION.

State regulations or causes of action are preempted by the National Labor Relations Act if they concern conduct which is actually or arguably either prohibited or protected by the National Labor Relations Act or concern conduct which Congress intended to be unregulated and left to the free play of economic forces (29 USC 151 *et seq.*).

3. LABOR RELATIONS—COLLECTIVE BARGAINING.

An employer has a duty to bargain collectively with a representative of its employees, but neither party is obliged to agree to a proposal or to make a concession (29 USC 158[a], [d]).

4. LABOR RELATIONS—COLLECTIVE BARGAINING—IMPASSE—UNILATERAL CHANGES.

An employer may not make a unilateral change in the conditions of employment which are under negotiation; however, following an impasse in negotiations, an employer is generally free to make unilateral changes in wages, hours and other terms and conditions of employment, provided the employer has bargained in good faith and a bona fide impasse has been reached.

5. LABOR RELATIONS—FEDERAL PREEMPTION—STATE LAW.

A state may, without federal preemption by the National Labor Relations Act, regulate conduct which is of only peripheral concern to the act or which is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law.

6. LABOR RELATIONS—EMPLOYMENT CONTRACTS—COLLECTIVE BARGAINING—ACTIONS.

The contract rights of individual employees under their employment contracts are not extinguished during negotiations for a collective-bargaining agreement pursuant to the National Labor Relations Act until the parties have entered into a valid agreement; until such an agreement is entered into, an employee may pursue an action in a state court for breach of the employment contract.

Greenspon, Scheff & Washington, P.C. (by *George B. Washington*), for plaintiffs.

Fox & Grove (by *Kalvin M. Grove* and *Steven L. Gillman*), and *Levin, Levin, Garvett & Dill* (by *Robert J. Finkel*), for defendants.

Before: D.E. HOLBROOK, JR., P.J., and MACKENZIE and E.A. QUINNELL,* JJ.

E.A. QUINNELL, J. Defendants appeal by leave granted, GCR 1963, 806.3(1)(a)(ii), from a circuit court order denying their motion for accelerated judgment under GCR 1963, 116.1(2). The circuit court rejected defendants' argument that state court subject-matter jurisdiction was preempted by the National Labor Relations Act (NLRA), 29 USC 151 *et seq.* We affirm.

I

Plaintiffs were hired as commission sales representatives prior to February 7, 1978, the certification date of plaintiffs' collective-bargaining representative, the Michigan AAA Sales Association (union). Defendants are five separate corporations acting under the umbrella of the Automobile Club of Michigan. After certification and prior to August 13, 1981, defendants and

* Circuit judge, sitting on the Court of Appeals by assignment.

the union met numerous times in an attempt to negotiate a collective-bargaining agreement. One of the central issues during negotiations was defendants' proposal to adopt minimum production standards. Under this proposal, a sales representative would receive an oral warning, followed in later months by a written warning, probation, and finally termination if the representative failed to reach the minimum standard for four consecutive months.

The parties did not reach an agreement. In July 1981, the defendants made their final offer which included the minimum production standards. The union rejected this proposal. Defendants then declared an impasse and implemented the minimum production standards, effective September 1, 1981. In January 1982, 40 of defendants' 570 commission sales representatives were discharged pursuant to the minimum production standards and offered lower paying salaried positions as advisors. These demotions followed the scheduled progressive discipline steps for violation of the minimum production standards.

Plaintiffs, seven individual sales representatives, filed suit in circuit court seeking a temporary restraining order, permanent injunction, and damages. The substance of plaintiffs' claims was based on *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980), *reh den* 409 Mich 1101 (1980). Plaintiffs alleged that they each had an oral employment contract, entered into at the time of their hire prior to union representation, in which defendants agreed not to demote or discharge plaintiffs without just cause. Plaintiffs claimed that defendants breached these contracts, since violations of the minimum production standards did not constitute "cause" under the original employment contracts.[1] Defendants argued

[1] Plaintiffs' complaint also contained counts alleging (1) miscalculation of production levels, (2) age discrimination, and (3) unlawful "redlining". These counts are not involved in this appeal.

that the NLRA preempted state court jurisdiction and moved for accelerated judgment under GCR 1963, 116.1(2). The circuit court denied the motion for accelerated judgment, finding that its subject-matter jurisdiction over plaintiffs' breach of contract claim was not preempted by the NLRA. We agree with the circuit court, and adopt its analysis with only minor variations.

II

In determining whether to grant a motion for accelerated judgment, all well-pled allegations in the complaint are to be accepted as true and construed most favorably to the plaintiff. *George v Petoskey*, 55 Mich App 433, 435; 223 NW2d 6 (1974). Thus, for purposes of determining whether plaintiffs' cause of action has been preempted by the NLRA, we assume that each plaintiff had an oral employment contract with defendants in which defendants agreed not to terminate or demote plaintiffs without just cause.

The United States Supreme Court has developed two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in *San Diego Building Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959), state regulations and causes of action are preempted if they concern conduct which is actually or arguably either prohibited or protected by the NLRA. The second preemption doctrine, set out in *Int'l Ass'n of Machinists & Aerospace Workers v Wisconsin Employment Relations Comm*, 427 US 132; 96 S Ct 2548; 49 L Ed 2d 396 (1976), proscribes state regulation and causes of action concerning (*Machinists*) conduct that Congress intended to be unregulated and left to the free play of economic forces.

Defendants assert that plaintiffs' suit for breach of contract, aimed at redressing defendants' unilateral implementation of the minimum production standards, is preempted under both

the *Garmon* and *Machinists* theories of preemption. The issue in this case is one of conflict between defendants' claim that implementing their final offer, which included the minimum performance standards, was an integral part of the collective-bargaining process and plaintiffs' claim that the implementation of the minimum production standards was a breach of plaintiffs' pre-existing employment contracts under state law.

Under § 8(a)(5) of the NLRA, an employer has the duty to bargain collectively with a representative of its employees. 29 USC 158(a)(5). Section 8(d), which defines this duty to include the obligation to meet at reasonable times and places to bargain over wages, hours, and other conditions of employment, does not compel either party to agree to a proposal or make a concession. 29 USC 158(d). An employer's unilateral change in the conditions of employment under negotiation is a violation of § 8(a)(5). However, following an impasse in negotiations, an employer is, generally, free to make unilateral changes in wages, hours and other terms and conditions of employment. *Bi-Rite Foods, Inc.* 147 NLRB 59 (1964). Nevertheless, the employer does not have the right to unilaterally change employment conditions unless it bargained in good faith and reached a bona fide impasse in negotiations. The employer must fulfill these prerequisites, prior to implementing the final offer, or its conduct will constitute an unfair labor practice under the NLRA. On the issue of impasse, see, generally, Gorman, Labor Law—Basic Text, pp 439-454.

III

We first address defendants' argument that plaintiff's breach of contract cause of action is preempted under the *Garmon* theory of preemption which precludes state actions concerning matters at least arguably prohibited by the NLRA. Defendants assert that their unilateral implementation of the minimum production standards was "arguably prohibited" by

§ 8(a)(5) of the NLRA, since the company did not have the right to unilaterally change employment conditions unless a bona fide impasse was reached. Thus, defendants argue that the implementation of the minimum production standards is "arguably prohibited" by the NLRA and plaintiffs' sole source of relief is the National Labor Relations Board (NLRB).

The Supreme Court has indicated that the *Garmon* guidelines are not to be applied in a literal, mechanical fashion, and it has developed a number of exceptions to *Garmon* preemption which are particularly applicable where states seek to regulate conduct which is arguably *prohibited* rather than arguably *protected*. *Sears, Roebuck & Co v. San Diego County Dist Council of Carpenters*, 436 US 180, 194-197; 98 S Ct 1745; 56 L Ed 2d 209 (1978). A state may regulate conduct that is of only peripheral concern to the NLRA or which is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law. *Garmon, supra*, 359 US 243-244.

In *Linn v United Plant Guard Workers of America*, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1966), the Court held that an employer official, who was allegedly libeled during a union organizing campaign, could maintain an action for defamation despite the fact that the union conduct was arguably an unfair labor practice under § 8(b)(1)(A) of the NLRA. Similarly, in *Farmer v United Brotherhood of Carpenters & Joiners of America*, 430 US 290; 97 S Ct 1056; 51 L Ed 2d 338 (1977), the Court held that the NLRA did not preempt a state action for intentional infliction of emotional distress, despite the arguably prohibited nature of the conduct. The Court identified two factors which warranted a departure from the general preemption guidelines. First, there existed a significant state interest in protecting its citizens from the challenged conduct. Second, the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction

of the NLRB, since the controversies presented to the state and federal forums would be different. *Farmer, supra*, p 304-305.

In *Sears, Roebuck & Co v Carpenters, supra*, the Court held that a state trespass action to enjoin peaceful picketing was not preempted. In that case, union pickets were stationed on Sears's property. When the union refused to remove the pickets, Sears obtained an injunction against the trespass and the pickets moved to a nearby public sidewalk. Finding, among other things, that the picketing was arguably prohibited under § 8, the Court, following the reasoning of *Farmer*, indicated that the critical inquiry was "whether the controversy presented to the state court is identical to * * * or different from * * * that which could have been, but was not, presented to the Labor Board". *Sears, supra*, p 197. The Court concluded that there was little risk of interference with the NLRB's regulatory jurisdiction, since the state court action concerned only the *location* of the picketing while the arguably unfair labor practice would focus on the *object* of the picketing. *Sears, supra*, p 198.

Recently, in *Belknap, Inc v Hale*, __ US __; 103 S Ct 3172; 77 L Ed 2d 798 (1983), the Court held that employees hired to replace striking workers could maintain causes of action in state court for misrepresentation and breach of contract. Although the replacement employees were hired as permanent employees, after the strike was settled the replacement employees were laid off to make room for the returning strikers. The replacement employees sued in state court for misrepresentation and breach of contract. The Court found that, even though the contracts for permanent employment in this instance were arguably prohibited by the NLRA, the state action was permissible since the foci of the determinations by the NLRB and the state court differed and the state had a substantial interest in protecting its citizens from misrepresentation and in providing remedies for breach of contract. The Court concluded that,

since the NLRB could provide no relief to the discharged replacement employees, the state's interests clearly outweighed any possible interference with the NLRB's function that might result from permitting the state action. *Belknap, supra*, 103 S Ct 3183; 77 L Ed 2d 814-815.

Application of these principles to the facts of the instant case leads to the conclusion that state court jurisdiction is not preempted under *Garmon, supra*. Plaintiffs' cause of action is based on *Toussaint, supra*. *Toussaint* holds, generally, that statements by an employer in its personnel policy literature and procedural manual may imply a contractual promise not to discharge the employee without good cause. The controversy presented to the state court will be different from that which would be presented to the NLRB. In the instant case, the state court is to decide whether or not there was an implied employment contract, and, if so, whether it was breached. In contrast, the NLRB would have to decide whether defendants' unilateral implementation of the production standards was a violation of their duty to bargain. The NLRB would focus on whether defendants bargained in good faith to a bona fide impasse. The NLRB would not decide whether defendants' action constituted a breach of plaintiffs' employment contracts. See, *e.g., JI Case Co. v National Labor Relations Bd*, 321 US 332, 340; 64 S Ct 576; 88 L Ed 762 (1944). Since this state has a substantial interest in adjudicating contractual disputes arising within its jurisdiction, we believe, as did the United States Supreme Court in *Belknap, supra*, that state interests outweigh any possible interference with the federal labor laws that might result from permitting the action for breach of contract to proceed.

IV

We next address defendants' argument that plaintiffs' suit for breach of contract is preempted under *Machinists v Wiscon-*

sin Employment Relations Comm, supra, which proscribes state actions in areas Congress intended to be unregulated. Defendants contend that the right to implement a final offer following good faith bargaining is an integral component of the collective-bargaining process which Congress intended to leave unregulated and subject to the free play of economic forces. Defendants point out that, since § 8(d) of the NLRA does not require any party to make a concession during negotiations, Congress obviously contemplated that stalemates would occur short of reaching an agreement. Once the parties have reached such a stalemate, unilateral changes are sanctioned, not only because it may break the impasse and thereby induce productive bargaining, but also because the failure of the parties to reach an agreement, after good faith negotiations, should not permanently restrain an employer from effectuating business changes. Thus, defendants argue, the NLRB and courts have recognized that an employer may make a unilateral change as a self-help economic weapon to counterbalance the employees' power to strike, which may break the deadlock of impasse, and also to relieve the employer of the requirement that it maintain the status quo once the union has refused to reach agreement.

In *Machinists*, union members refused to work overtime during negotiations for renewal of an expired collective-bargaining agreement. The NLRB dismissed a complaint of the employer, finding that there was no violation of the NLRA. Thereafter, the employer obtained an order from the Wisconsin Labor Relations Commission enjoining the union members from refusing overtime assignments, based on a finding that the union had committed an unfair labor practice under state law. The Supreme Court found that the NLRA preempted state or federal causes of action where it was determined that Congress intended the conduct to be unregulated and left to the free play of economic forces. The Supreme Court stated: "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether

'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" 427 US 132, 147-148 (quoting from *Brotherhood of Railroad Trainmen* v *Jacksonville Terminal Co.* 394 US 369, 380; 89 S Ct 1109; 22 L Ed 2d 344 [1969]). The Court concluded that the NLRA's processes would be frustrated by the Wisconsin law, since the use of economic pressure by the parties to a labor dispute is part and parcel of the collective-bargaining process and Wisconsin had attempted to regulate the substantive aspects of the bargaining process. 427 US 132, 148-149.

Defendants herein argue that, as in *Machinists*, plaintiffs may not maintain a breach of contract action which would frustrate the employer's right to implement its final offer after negotiations have reached impasse. We believe that the circuit court correctly read *Machinists* in light of Justice Powell's concurrence:

> "I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength. Except where Congress has specifically provided otherwise, the States generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy.* See Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1355-1356 (1972).

"* State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining." 427 US 132, 156.

In the instant case, the circuit court concluded that state enforcement of an employment contract does not directly regulate the concerns of the NLRA. Although enforcement of an employment contract may have an incidental effect on the collective-bargaining process, the employer's right to implement its final offer emanates from its common-law, entrepreneurial right to run its business. However, the employer's common-law right to implement its final offer must be seen as limited by the employer's common-law duty to honor its contracts of employment. We believe that this is the appropriate accommodation of the parties' rights. A similar accommodation was found in *Belknap, supra.*

Defendants also argue, under the *Machinists* doctrine, that pre-existing employment contract rights cannot be used to supersede the results of collective bargaining. Defendants concede that rights under individual employment contracts survive election of a union and the beginning of negotiations, but contend that those claims disappear when impasse is reached. To hold otherwise, defendants argue, would obviate the process of collective bargaining. We disagree.

In *National Licorice Co. v National Labor Relations Bd,* 309 US 350; 60 S Ct 569; 84 L Ed 799 (1940), the Court considered a prior employment agreement which purportedly foreclosed employees from striking, from demanding a closed shop, and from signing agreements with any union. In sustaining the order of the NLRB forbidding the employer from enforcing the prior agreements, the Court stated:

> "The effect of the Board's order, as we construe it, is to preclude the [employer] from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. *It does not foreclose the employees from taking any action to secure an adjudica-*

> *tion upon the contracts, nor prejudge their rights in the event of such adjudication.* We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." 309 US 350, 365 (emphasis added).

The Court's construction of the order illustrated its concern for preserving the contract rights of the employees. The Court also read the order to be directed solely to the employer and as "ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal * * *". *National Licorice*, 309 US 350, 366.

Similarly, in *JI Case Co* v *NLRB*, *supra*, the United States Supreme Court upheld an NLRB finding that the employer could not use pre-existing individual employment contracts as a device to avoid collective bargaining with its employees. Contrary to the suggestion of defendants herein, the Court did not hold that the terms of an individual employment contract were totally extinguished. The Court stated:

> "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, *the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.*" 321 US 336-337 (emphasis added).

The specific language of *JI Case* indicates that individual contract rights are not extinguished until the parties enter into a valid collective-bargaining agreement. Plaintiffs' actions for breach of contract are enforceable in state court.

V

We hold that plaintiffs are not prohibited from maintaining breach of contract actions under either the *Garmon* or the *Machinists* doctrine of federal preemption. Therefore, the judgment of the circuit court is affirmed and this cause is remanded for proceedings not inconsistent with this opinion.

Affirmed. No costs, a public question being involved.

STATE OF MICHIGAN
CIRCUIT COURT OF COUNTY OF WAYNE

CLIFFORD ROBERTS, et al.,
Plaintiffs,

v.

AUTOMOBILE CLUB OF MICHIGAN, et al.,
Defendants.

82-203440 CZ

ORDER DENYING IN PART DEFENDANTS' MOTION FOR ACCELERATED OR SUMMARY JUDGMENT AND DENYING MOTION FOR A STAY OF DISCOVERY

At a session of said Court, held in the City-County Building, in the City of Detroit, on the 25th of June, 1982.

PRESENT: HONORABLE WILLIAM LEO CAHALAN, Circuit Judge

This matter having come on for hearing on defendant's Motion for Accelerated Judgment, or in the Alternative for Summary Judgment, and the parties having filed extensive briefs and argued orally regarding said motion, and the Court being fully advised in the premises;

NOW, THEREFORE, for the reasons set forth in the Court's May 28 Opinion on Issue of Preemption the Motion for Accelerated, or in the Alternative Summary Judgment, is denied insofar as it alleges that this action has been pre-empted by the operation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The remainder of the motion remains extant. It is further ordered that pursuant to General Court Rule 806.3 the issues discussed in the Court's May 28 Opinion are certified as involving controlling questions of law as to

which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

It is further ordered that the motion for a stay of discovery be and hereby is denied.

WILLIAM LEO CAHALAN
William Leo Cahalan—Judge
Third Judicial Circuit

Approved as to Form:

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By A. JUSTICE
Issuing Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF WAYNE

Clifford Roberts, et al., *Plaintiffs,* v. Automobile Club of Michigan, et al., *Defendants.*	Civil Action No. 82-203-440-CZ

OPINION
ON
ISSUE OF PREEMPTION

STATE OF MICHIGAN

IN THE CIRCUIT COURT

For the County of Wayne

Clifford Roberts, et al.,
Plaintiffs,

v.

Automobile Club of Michigan, et al.,
Defendants.

Civil Action
No. 82-203-440-CZ

OPINION ON ISSUE OF PREEMPTION

This suit arises from the discharge or demotion of a group of sales representatives, plaintiffs herein, by their employers, Automobile Club of Michigan and others, defendants herein. The case is presently before the Court on defendants' Motion for Accelerated Judgment, pursuant to GCR 1963, 116.1(2), on Counts I and II of the complaint. Defendants assert that the Court lacks subject matter jurisdiction to decide this controversy because its jurisdiction has been pre-empted by the operation of the National Labor Relations Act, 29 USC § 151 *et seq.* (NLRA), and that the case ought to be before the National Labor Relations Board (NLRB).

Plaintiffs allege, and the Court will assume for the sake of this Motion, that each plaintiff had an oral employment contract with defendants in which defendants agreed not to terminate or demote plaintiffs without cause.[1] Plaintiffs claim

[1] It is acknowledged that plaintiffs base their cause of action alleged in Counts I and II on the holding of *Toussaint* v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579, 598 (1980):

(Footnote continued on following page.)

that subsequent unilateral revisions in defendants' sales quotas and standards, (so called "Minimum Performance Standards") the alleged violation of which purportedly caused the discharge or demotion of plaintiffs, do not constitute "cause" under their original employment contracts, and hence, by discharging or demoting plaintiffs on account of violations of these unilateral changes in sales quotas and standards, defendants have breached the contracts. The relief sought is for damages and for reinstatement.

In their Motion, defendants call attention to other facts which, they claim, operate to oust this Court of its jurisdiction. It is undisputed that when the alleged oral employment contracts were originally entered into the sales representatives were not members of any union. However, since October of 1980, the plaintiff sales representatives have organized themselves, and have elected a collective bargaining agent, the Michigan AAA Sales Association (the union), to represent the sales representatives. Since that time, the Union and defendants have attempted to conclude a collective bargaining agreement without success. Defendants claim that a good faith impasse in the collective bargaining process was reached, and that only at this point did they implement the Minimum Performance Standards as part of their last offer to the Union.

Defendants conclude from these facts that the Court's jurisdiction has been pre-empted, and that the instant con-

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(Footnote continued from preceding page.)

1) A provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is "indefinite," and

2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

troversy properly belongs before the NLRB. Their conclusion rests on three theories: *First*, once a collective bargaining agent was elected and the collective bargaining process begun, the enforcement of pre-existing contract rights cannot be used to interfere with or impede the collective bargaining process since once a collective bargaining agent is elected and collective bargaining begun, individual contract rights are deemed to be extinguished. *Second*, the conduct complained of, namely the defendants' implementation of the Minimum Performance Standards, is activity which is arguably protected under Section 7 of the NLRA, 29 USC § 157, or prohibited under § 8, of the NLRA, 29 USC § 158. Controversies involving such activities are to be resolved exclusively by the NLRB. *Third*, the right of free collective bargaining, including the right to resort to economic sanctions, may not be infringed by state courts because Congress has intended that such conduct be left unregulated.

I

The first issue to be discussed is whether the election of a collective bargaining agent and the initiation of collective bargaining so far extinguishes all previously existing employment contracts such that a suit for a purported breach of the previous contract may not be entertained in state court since to do so would constitute an undue interference with the collective bargaining process.

In *J. I. Case Co* v *NLRB*, 321 US 332, 88 L Ed 762 (1943), the Court had an opportunity to examine the effect of collective bargaining and collective bargain agreements on pre-existing employment contracts. In that case, an employer had previously entered into separate employment contracts with individual employees before collective bargaining occurred. The employer refused to bargain with the union alleging that to

do so would constitute a breach of its prior employment contracts. A complaint was brought before the NLRB, and it issued an order which ordered the employer to cease from giving effect to the pre-existing contracts. The Supreme Court affirmed and held that the employer could not use the individual employment contracts as a device which would excuse him from collectively bargaining with his employees. The Court noted:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337, 88 L Ed at 767.

However, contrary to the suggestion of defendants, the Court did not hold that the terms of an individual employment contract were totally extinguished. As the Court noted:

> Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, *not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment,* because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, *the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.*

Id. at 336-337, 88 L Ed at 767 (emphasis added).

This reasoning is in accord with the holding of an earlier case, *National Licorice Co* v *NLRB*, 309 US 350, 84 L Ed 799 (1939), in which the Court considered a prior agreement

between an employer and its employees, which purportedly foreclosed its employees from striking, from demanding a closed shop or from signing agreements with any unions. In sustaining the Order of NLRB, which forbade the employer from enforcing the prior agreement, the Court said

> The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. *It does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication.* We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it.

Id. at 365, 84 L Ed at 811 (emphasis added).

The Court's concern over preserving the right of the employees to enforce the beneficial portions of the contract was further emphasized in its modification of the NLRB's order.

> As the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the Board's order is directed solely to the employer and is *ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal. . .*
>
> The Board's order to post notices requires the notice to announce that the contracts with the employees are "void and of no effect". In order that the notice may more accurately represent the affirmative action of the Board and that misinterpretation of its action may be avoided, the

order appealed from should be so modified as to omit the quoted words and direct that clause (3) of the Board's order, numbered 2(d) specifying the contents of the notice, read as follows:

> (3) that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in violation of the National Labor Relations Act; and that the respondent will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; *but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts.*

Id. at 366-367, 84 L Ed at 812.

Therefore, it cannot be said that the individual contract rights are extinguished once the collective bargaining process has begun so as to preclude their enforcement in an "appropriate tribunal",[2] state or federal.

II

The next question is whether the enforcement of the individual contracts in a state court would so far conflict with the NLRB's exclusive jurisdiction to regulate activities which are protected by Section 7 of the NLRA, 29 USC § 157, or are prohibited under Section 8, 29 USC § 158 that due regard for the federal enactment requires that state jurisdiction in this controversy must yield.

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[2] It should be noted that the NLRB could not be an appropriate tribunal in which to adjudicate the validity of the contracts. As noted in *J.I. Case Co* v *NLRB*, *supra* at 340, 88 L Ed at 769: "The Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *See also National Licorice Co* v *NLRB*, *supra* at 364, 88 L Ed at 810; *Local Union No 67* v *Duquesne Brewing Co of Pittsburgh*, 354 F Supp 1033, 1034 (WD Pa, 1973).

The general test to determine the permissible scope of state regulation of activity touching upon labor-management relations is stated in *San Diego-Building Trades Council* v *Garmon*, 359 US 236, 245, 3 L Ed 2d 775, 783 (1959):

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

However, in commenting on the reach of this broad rule, the Court noted in *Sears Roebuck & Co* v *Carpenters*, 436 US 180, 188-189, 56 L Ed 2d 209, 219-220 (1978):

> While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected . . .
>
> Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion. This refusal demonstrates that . . . 'the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies' of permitting the state court to proceed.

In the instant case, defendants assert that the plaintiffs' suit for breach of contract is aimed essentially at regulating its unilateral implementation of the Minimum Performance Standards. They claim that such activity is either arguably protected or arguably prohibited by the NLRA.

Section 7 of the NLRA deals exclusively with employees' rights incident to forming a collective bargaining unit. Therefore defendants activities cannot be said to be "protected

activities" under § 7. Section 8 of the NLRA, however, addresses those activities which are prohibited. Under Section 8(a) (1) and (5) of the NLRA, 29 USC 158(a) (1), (5), an employer may not unilaterally implement changes in the terms and conditions of employment. An exception is found when, during the collective bargaining process, an impasse has been reached after good faith negotiations have been attempted. Upon such an impasse having been reached, the employer may implement its last offer. *NLRB* v *Bradley-Wash Fountain Co,* 192 F2d 144, 150-151 (7th Cir 1951); *Excavation-Construction, Inc* v *NLRB,* 660 F2d 1015, 1023 (4th Cir 1981). The unilateral implementation of the Minimum Production Standards, thus, could be considered activity which is at least arguably, prohibited by Section 8. Under a formulistic application of *Garmon, supra,* the present suit could be deemed to be pre-empted. However, as made clear by *Farmers* v *Carpenter,* 430 US 290, 302, 51 L Ed 2 338, 351 (1977) and *Sears, Roebuck & Co* v *Carpenters, supra,* an "inflexible application of the doctrine is to be avoided". Rather the Court's resolution of the question of pre-emption in such cases rests on a "balanced inquiry" into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation. *Farmers* v *Carpenter, supra* at 300, 51 L Ed at 350. The Court, in *Farmers,* used this approach when analyzing a prior case, *Linn* v *Plant Guard Workers,* 383 US 53, 15 L Ed 2d 582 (1966) (holding that an employee's common law cause of action for malicious libel was not pre-empted):

> But a number of factors influenced the (*Linn*) Court to depart from the *Garmon* rule. First, the Court noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 US, at 61, 15 L Ed 2d 582, 86 S Ct 657, and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the

> Court recognized that there was 'an overriding state interest' in protecting residents from malicious libels, and that this state interest was 'deeply rooted in local feeling and responsibility'.
>
> *Id.*, at 61, 62, 15 L Ed 2d 582, 86 S Ct 657.
>
> Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy. The Board's § 8 unfair labor practice proceeding would focus on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions.
>
> *Id.*, at 63, 15 L Ed 2d 582, 86 S Ct 657.
>
> Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. *Ibid.* Conversely, the state law action would be unconcerned with whether the statements were coercive or misleading in the labor context, and in any event the court would have power to award *Linn* relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule.
>
> *Id.* at 298, 299, 51 L Ed 2d at 349.

The *Farmer* Court's analysis of the facts before it, involving a common law suit for intentional infliction of emotional distress, paralleled the above analysis. It noted that the federal statutes did not protect or prohibit the "outrageous conduct" complained of by the plaintiff. *Id.* at 302, 51 L Ed at 351. Looking at the state interests involved, the Court noted that the State had a substantial interest in protecting its citizens from the kind of abuses of which the plaintiff had complained. *Id.* Although the Court acknowledged that there would be some risk that the state cause of action would touch on an area of primary federal concern it held that the risk was insubstantial. It reasoned that the abusive conduct and the severe emotional distress allegedly caused thereby with which the state tort action was concerned, would be largely irrelevant to the proceedings on an unfair labor practice claim before the NLRB, which would focus on

whether the union discriminated or threatened to discriminate against him in employment referrals. *Id.* at 304, 51 L Ed 2d 352-353. Accordingly, the Court held that plaintiff's cause of action was not pre-empted.

In *Sears Roebuck & Co* v. *Carpenters, supra*, a case involving whether the enforcement of a state trespass statute as to the location of picketing was pre-empted, the Court used a similar analysis in holding that there was no pre-emption. The Court discussed the problem as follows:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.
>
> [1c] In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices. (footnotes omitted)

Id. at 197-198, 56 L Ed 2d at 225-226.

In reviewing the analysis of the above cases, it seems that where the competing State and Federal interests are substantially different, and where the issues involved, if the case were presented before a state court or the NLRB, would be different and turn on the evaluation of substantially different facts, despite the rule of *Garmon, supra*, pre-emption would not be found. Application of these principles in conjunction with the analysis of the above described cases, results in a conclusion that pre-emption based upon Sections 7 and 8 of the NLRA, 29 USC § 157, 158, does not obtain in the instant case.

First, it is to be noted that defendants' acts are not "protected" as understood in the context of the NLRA. As noted in *Sears Roebuck & Co* v *Carpenter, supra*, at 190, 56 L Ed at 221, acts which are protected are those acts protected under § 7 of the NLRA, 29 USC 157.[3] As noted earlier, the provisions of § 7 apply to the activities by employees in organizing a collective bargaining unit and in seeking collective bargaining rights. Therefore, defendants actions cannot be said to be those which are protected by the Act. Indeed, the employers' "right" to implement a last offer arises in the context of labor management disputes only when it is alleged that it might constitute an unfair labor practice on the part of the employer as violative of the employers' duty to bargain collectively in good faith pursuant to § 8(a)(5), *NLRB* v *Bradley Wash Fountain Co, supra*, or the employer's duty not to

[3] It should be noted that the Court considered protected acts also to be those acts which under the line of cases exemplified by *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132, 49 L Ed 2d 396 (1976) pre-emption was found to exist regarding activities neither protected by § 7 nor prohibited by § 8 but where it was found that Congress intended that the conduct involved be unregulated and left to be controlled by the free play of economic forces. Because the application of *Machinists* in the instant case involves analysis significantly different from that utilized in *Farmer* and *Sears Roebuck & Co*, this Court will consider *Machinists* separately in a latter portion of this opinion.

interfere with the Union's relationship with its members by undercutting its representation of its members pursuant to § 8(a)(1). *Excavation Construction Inc* v *NLRB; NLRB* v *Bradley Wash Fountain Co, supra.* Hence, the Court concludes that the activity which is complained of is not prohibited under § 8 of the NLRA.

Although the state's interest is not as evident in the instant case as it would be in the instance of the State's prohibition of violence or other tortious acts, state courts have long enjoyed traditional jurisdiction over contractual disputes arising within their jurisdiction. *Dowd Box Co* v *Courtney*, 368 US 502, 505, 7 L Ed 483, 486 (1962), *quoting from* 341 Mass 337, 339, 169 NE 2d 885, 887. And, as noted earlier the NLRB has no power to adjudicate the validity or effect of individual employment contracts. *J. I. Case* v *NLRB, supra; National Licorice Co* v *NLRB, supra.* The presence of traditional jurisdiction in the state court to resolve disputes arising out of private employment contracts, and the absence of it in the NLRB, suggests that there is a cognizable state interest.

Finally, a comparison of the issues involved were an unfair labor suit brought before the NLRB attacking the implementation of the minimum performance standards with those involved in plaintiffs suit for breach of contract in this court leads to the conclusion that there is little risk that the state cause of action will interfere with the effective administration of the national labor policy. An unfair labor suit before the NLRB alleging a violation of Section 8(a)(5) would necessarily focus on whether there was a bonafide impasse in the collective bargaining negotiations. Facts relevant to this determination would seem to center on the activities of the parties during collective bargaining and the parties' efforts at attempting resolution of collective bargaining issues. *Taft Broadcasting*, 163 NLRB 475, 478 (1962). Or, an unfair labor practice suit alleging a violation of Section 8(a)(1) would necessarily focus

on whether a bonafide impasse in negotiations had occurred and also whether the employer's actions were meant to interfere with, coerce, or restrain employees in the exercise of their collective bargaining rights, and whether the acts were meant to disparage or undermine the Union's representation of its members. *NLRB* v *Bradley Wash Fountain Co, supra* at 151. On the other hand, plaintiffs state cause of action for breach of contract would primarily focus on the terms and conditions of employment as originally agreed upon, either expressly or impliedly between the parties. Specifically, it would revolve on whether the original agreement embodied any promise by the employer not to discharge the sales representatives without cause. *Toussaint* v *Blue Cross and Blue Shield of Michigan, supra* at 598, and if so to what extent did it leave the employer free to alter the standards of performance by which cause sufficient for dismissal or demotion could be determined such that a subsequent unilateral change by the employer in the performance standards and the enforcement thereof which resulted in the dismissal or demotion of employees would constitute a breach of contract. What the original agreement between the parties was or what they intended by the original agreement are matters that would be largely irrelevant to the proceedings before the NLRB. Similarly, facts concerning the conduct and motivation of the parties during the collective bargaining process, would have no bearing on the state cause of action. Under the analysis of the cases described above, it can be concluded that the risk of interference with the unfair labor practice before the NLRB by maintaining this suit is not substantial.

This conclusion is further bolstered by noting that in the realm of the enforcement of collective bargaining contracts, a union or employee may sue the employer for breaching that contract. Section 301 of the Labor Management Relations Act, 29 USC § 185. It has been held that the suit on the contract may be brought not only in federal court but also in state

courts, *Dowd Box Co* v *Courtney, supra.* As noted by the Illinois Court of Appeals in *Alexander* v *Standard Oil Co,* 53 Ill App 3rd 690, 368 NE 2d 1010, 1014 (1977) *lv den,* a case involving a suit on an individual employment contract in state court:

> The enactment of section 301, however, evinces a clear Congressional intent that regulation of the contractual relationship between employers and union members not be left solely to the NLRB or the "free play" of market forces. Moreover, since Congress has determined that federal or state court adjudication of collectively bargained contract rights does not unduly interfere with a uniform system of labor relations law, then clearly state court adjudication of employer and employee rights under individual contracts cannot be said to present such an impediment to the uniform regulation of collective bargaining as to require federal preemption of state court jurisdiction over these actions. We conclude, therefore, that the individual contracts involved in this case, although closely linked to a collective bargaining agreement between the parties, may be the subject of an enforcement action in state courts.

To summarize, it is apparent that 1) the activity engaged in by defendants is not protected or prohibited activity, 2) that the state does have a cognizable interest in the enforcement of employment contract and 3) since the issues, and facts relevant to their determination, would be essentially different were the case brought before the NLRB, the risk of interference with the unfair labor practice before the NLRB is not substantial. *Sears Roebuck & Co* v *Carpenters, supra.* Accordingly, under the analysis expounded in *Farmers* v *Carpenter, supra* and *Sears Roebuck & Co* v *Carpenters, supra,* the instant action on an alleged oral contract is not pre-empted.

III

Notwithstanding the above, defendants assert that the "right of free collective bargaining, including the right to

economic sanctions, may not be infringed by a state court", because defendants argue, Congress has intended such conduct to be left unregulated, and controlled only by the free play of economic forces. In this respect, defendants principally rely upon *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132, 49 L Ed 2d 396 (1976), in which the Court held that not only would federal law pre-empt state jurisdiction where the conduct in question is arguably protected by or prohibited by the NLRA, but also where the conduct consists of peaceful economic weapons used in support of bargaining demands. It is asserted by the defendants that their unilateral implementation of minimum performance standards, after a bonafide impasse in the collective bargaining process had occurred, is merely a peaceful economic weapon implicitly authorized by the NLRA by absence of prohibition and, therefore, intended by Congress to be pre-empted from state regulation. Yet the context of the *Machinists* case, and the concurrence of Justice Powell and Chief Justice Burger indicates that its holding is inapplicable to the case at bar.[4]

The case arose out of the enforcement by the Wisconsin Employment Relations Commission of provisions in the Wisconsin statutes addressed to labor relations. The Court noted that the actions of the Commission were "not filling a regulatory void which Congress plainly assumed would not exist . . . Rather, it is clear beyond question that Wisconsin entered into the substantive aspects of the bargaining process . . ." *Id.* at 149, 49 L Ed 2d 396, 408.

The concurrence of Justice Powell and Chief Justice Burger made it clear that the holding of the Court was a limited one,

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[4] It should be noted that the opinion of the Court was a 6-3 decision. Justice Powell and Chief Justice Burger's votes in the opinion of the Court can, therefore, be seen as "swing votes". Their concurring opinion as to the reach of the opinion of the Court, obviously, has special significance.

applicable to those state regulations which directly curtail the use of economic weapons, such as self help:

> I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength. Except where Congress has specifically provided otherwise, the States generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy. See Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1355-1356 (1972).
>
> . . . .
>
> State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.

Id. at 156, 46 L Ed at 412-413.

Indeed the discussion contained in the Court's Opinion echoes Justice Powell's concerns. The Court noted, quoting from Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1352 (1972)

> An appreciation of the true character of the national labor policy expressed in the NLRA and the LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if *a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.* (emphasis added)

Id. at 139, 49 L Ed at 403.

In the case at bar, the state regulation to be applied, namely the enforcement of an employment contract, does not

directly regulate the concerns of the NLRA such as "employee self organization, labor disputes, or collective bargaining". Although it is true that it may have an incidental effect on the collective bargaining process, the enforcement of an employment contract is essentially neutral in the sense that it does not represent an accommodation or evaluation of the special interests of the parties in collective bargaining. Therefore, it may be concluded that the rule of the *Machinists* case is inapplicable to the case at bar.

Lastly, although defendants have argued that an employer's right to implement unilaterally his last good faith offer is one which Congress intended be unregulated by the States and left to the free play of economic forces, upon careful search for Congressional intent as expressed in the NLRA and LMRA, the Court has been unable to find any expression of this intent. On the contrary, although an employer's right to implement unilaterally his last good faith offer may be somewhat curtailed by the operation of section 8 of the NLRA, *see, BiRite Foods, Inc*, 147 NLRB 59 (1963), yet his right to do so essentially emanates from the common law, entreprenearial right of an employer to run his business. As such, the employer's common law right to implement unilaterally his last good faith offer must be seen as being also limited by an employee's common law right to enforce his contract of employment. Disputes regarding such common law rights of employers and employees ought to be and traditionally have been resolved in State courts.

IV

In conclusion, it may be said that, in the instant case, the individual employment contract rights of the employees have not been totally extinguished by the mere election of a collective bargaining representative or by the commencement of collective bargaining. Further, the enforcement of these rights, will not unduly interfere with the jurisdiction of the NLRB.

Lastly, although it is arguable that the activity complained of is a legitimate economic weapon being used in collective bargaining process, the action in state court affecting it is essentially neutral. Accordingly, for these reasons it must be concluded that the Court's jurisdiction in this case is not pre-empted, and defendants' motion for accelerated judgment ought to be denied.

WILLIAM LEO CAHALAN
William Leo Cahalan, Judge
Third Judicial Circuit

May 28, 1982

A TRUE COPY
JAMES R. KILLEEN
CLERK

By A. JUSTICE
Issuing Clerk

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., are set forth below:

* * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (c) . . . If upon [all] *the preponderance of* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .

Supreme Court, U.S.
FILED
MAY 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1731

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, On Behalf Of Themselves And On Behalf Of The Class Of All Sales Representatives Of The Defendants in the Counties of Wayne, Macomb and Oakland,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 22(6) of the Rules of the Court, this supplemental brief is submitted to direct the Court's attention to a significant new labor preemption decision, *National Metalcrafters, Division of Keystone v. McNeil,* 784 F.2d 817 (7th Cir. Feb. 28, 1986) ("*Keystone*"), which was not available at the time the petition was filed.[1]

[1] The petition for writ of certiorari was filed on April 15, 1986. *Keystone* was published on or about April 7, 1986. That publication was not received in the office of petitioners' counsel, or brought to counsel's attention, however, until after the filing of the petition.

This case presents the question of whether a state can, consistent with the National Labor Relations Act ("NLRA"), invoke contractual rights to preclude an employer's use of an economic weapon permitted by federal law. The same issue was in dispute in *Keystone*.[2] Indeed, *Keystone* even involved the same economic weapon: unilateral implementation of the employer's final offer after a bargaining impasse. There, as here, this weapon—conduct which the Court of Appeals deemed "protected" under the NLRA—was challenged because it allegedly deprived employees of contractual "vested rights." 784 F.2d at 827. The employer's response in *Keystone*, as in this case, was that the employee's exclusive remedy was that provided for by the NLRA.

The Seventh Circuit's opinion in *Keystone*, written by Judge Posner, concluded, contrary to the decision below, that "there just is no state remedy." *Id.* at 828. The contractual claim, as a result, was found to be preempted by the NLRA.[3] The basis for this conclusion is the same ground which petitioner has advanced as the principal reason for granting certiorari, that the state remedy "as applied in this case ... in effect authorizes a state official to inject himself into the bargaining process...." The resulting "potential for interference with the system of collective bargaining" was deemed "too great" to sanction a state remedy. *Id.* at 828. That conclusion is similarly warranted in this case.

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[2] The employer in *Keystone* also raised challenges to the state's action predicated on the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. The Court of Appeals dealt with each issue separately. It decided it did not have to reach the ERISA question because the application of state law was preempted by both the NLRA and Section 301. 784 F.2d at 823.

[3] Although the Circuit also found preemption under Section 301 of the Taft-Hartley Act, the finding of NLRA preemption was an independent ground; the state action, in other words, was "doubly preempted." 784 F.2d at 828.

Keystone underscores, therefore, the inappropriate accommodation between federal and state law reached by the Michigan courts in the present case. The conflict between the rationale of that decision and the views of the court below is an additional compelling reason to grant the petition for certiorari.

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Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1731

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, On Behalf Of Themselves And On Behalf Of The Class Of All Sales Representatives Of The Defendamts in the Counties of Wayne, Macomb and Oakland,

Respondents.

SECOND SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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SECOND SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

Petitioners previously submitted a supplemental brief to bring to the Court's attention a significant recent decision (*National Metalcrafters, Division of Keystone v. McNeil,* 784 F.2d 817 (7th Cir. Feb. 28, 1986)), which emphasized the need for this Court to resolve the *Machinists*[1] labor law preemption issues presented by this case. The instant brief, which also is submitted pursuant to Rule 22(6) of the Rules of the Court,

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[1] *Lodge 76, I.A.M. v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976).

directs the Court to two other important opinions (*Serrano v. Jones & Laughlin Steel Co.*, ____ F.2d ____, 99 BNA Daily Labor Report D-1 (6th Cir. May 8, 1986) and *U.A. 198 Health and Welfare Education and Pension Funds v. Rester Refrigeration Service, Inc.*, ____ F.2d ____, 103 BNA Daily Labor Report E-1 (5th Cir. May 23, 1986)),[2] not available at the time the petition was filed.[3] *Serrano* and *Rester Refrigeration* underscore the equally compelling need for this Court to address the application of the *Garmon*[4] doctrine, the other prong of labor law preemption, to the instant case.

1. Like the present case, *Serrano* involved employees invoking state law to challenge management actions undertaken as a component of collective bargaining. Here, that challenge is predicated on state contract law; in *Serrano,* it was principally premised on state tort law.[5] In both cases the disputed action was conduct encompassed by the good faith bargaining provisions of Sections 8(a) (5) and 8(d) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a) (5) and (d). Accordingly, the employer's response in *Serrano,* as in this case, was that the employee's exclusive remedy was that provided by the National Labor Relations Act ("NLRA").

As noted by the Sixth Circuit in *Serrano,* "the dual nature of [*Garmon*] preemption in the field of labor law[,] [i]n addition to protecting 'the exclusive jurisdiction of the Board over matters arguably within the reach of the Act,' [also]

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[2] The *Serrano* and *Rester Refrigeration* decisions are reproduced in the appendix hereto.

[3] The petition for writ of certiorari was filed on April 15, 1986. *Serrano* was informally published on May 22, 1986. *Rester Refrigeration* was informally published on May 29, 1986.

[4] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

[5] The employees also raised separate contractual claims with respect to the employer's alleged breach of the collective bargaining agreement. These causes were addressed independently under Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. App. at 1[illegible]

requires 'the substantive preemption by the federal labor law in the area to which it applies.' " App. at 12a, quoting *Local 926, International Union of Operating Engineers v. Jones,* 460 U.S. 669, 680 (1983). "Applying the step-by-step process outlined in *Engineers v. Jones," Serrano* initially concluded, as did the trial court in this case, that "the conduct which the plaintiffs seek to have regulated under state law is arguably prohibited by the [NLRA]." App. at 15a; see Pet. App. 28a ("The [Auto Club's] unilateral implementation of the Minimum Production Standards, thus, could be considered activity which is, at least arguably, prohibited by Section 8 [of the NLRA]").[6] Like the court below, *Serrano* then also determined "that the conduct at issue is not 'a mere peripheral concern of the Act.' " App. at 15a; see Pet. App. 15a ("... enforcement of an employment contract [such as those here at issue] may have an incidental effect on the collective bargaining process..."). The Sixth Circuit and the opinion below parted company, however, at the final analytical step: the proper balancing of state and federal interests to determine whether the disputed acts fell within *Garmon*'s "local feeling and responsibility" exception. *Serrano* concluded that the state "interest in protecting its citizens from misrepresentations ... is properly overridden by the need to enforce a uniform federal labor law." App. at 16a. This decision was based on (1) the fact that, in contrast to *Belknap v. Hale,* 463 U.S. 491 (1983), "[t]here [was] only one group of employees" in both the state and NLRA cases rather than separate actions involving different groups of employees, (2) identical relief was sought in the state and NLRA proceedings, and (3) "[u]nlike *Belknap,* this [was] not a case involving discrete controversies." App. at 16a. Conversely, while the

[6] The requirement that "the party asserting pre-emption must make an affirmative showing that the activity is arguably subject to the [NLRA]" (International Longshoremen's Assn. vs. Davis, ____ U.S. ____, 54 U.S.L.W. 4512, 4517 (May 27, 1986)), has, therefore, been met here.

instant case also involved all of these same considerations,[7] the court below concluded that "state interests outweigh any possible interference with the federal labor laws that might result from permitting the action for breach of contract to proceed." Pet. App., p. 12a. Divergent results, in sum, were reached by *Serrano* and the court below when balancing the respective federal and state interests at issue.

2. *Rester Refrigeration* involved a challenge to management actions predicated on Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132 and 1145, rather than state law.[8] Like the present case, however, the challenge involved employer conduct regulated by the NLRA. In *Rester Refrigeration,* at issue was the employer's obligation to continue to honor existing terms of employment after the expiration of a collective bargaining agreement until such time as there is a *bona fide* bargaining impasse; here, it is the converse of that

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[7] While not disputing that, unlike *Belknap,* only a single group of employees is involved here and that identical relief was available before the NLRB and the state courts, the lower court here found that "[t]he controversy presented to the state court will be different from that which would be presented to the NLRB." Pet. App., p. 12a. This conclusion is wrong. Here, as in *Serrano,* the gravamen of respondents' claims is that, by effectuating its final offer after impasse, the Auto Club acted improperly. The improprieties in *Serrano* were alleged fraud and misrepresentations coincident with collective bargaining negotiations. In this case, it is the claim "that the implementation of [the employer's final bargaining offer] . . . was a breach of plaintiffs' pre-existing employment contracts under state law." Pet. App., p. 12a. Both assertions similarly implicate employer bargaining obligations under the NLRA.

[8] The fact that federal rather than state law is invoked to attack conduct within the preemptive scope of the NLRA is, of course, immaterial. See, *e.g., Garner v. Teamsters,* 346 U.S. 485, 491 (1953) ("The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so").

obligation, the employer's right to modify existing terms of employment once such an impasse exists. The employer in *Rester Refrigeration,* as in this case and *Serrano,* argued that, under *Garmon,* the NLRA provided the exclusive remedy.

In the present case, in its accommodation of the conflicting federal and state interests, the court below erred because it misconceived the basis of the employer's rights in dispute. Rather than recognizing that those rights are derived from federal statute, as the Fifth Circuit made clear in *Rester Refrigeration* (App. at 25a, n. 10), the Michigan court held that "the employer's right to implement its final offer emanates from its common law, entrepreneurial right to run its business." Pet. App. 15a. As a result, the court concluded that "the employer's common law right to implement its final offer must be seen as limited by the employer's common law duty to honor its contracts of employment . . . this is the appropriate accommodation of the parties' rights." *Id.* By contrast, in *Rester Refrigeration,* since the employer's right was correctly recognized as one created by the NLRA which "[b]ecause of its specialized expertise, the Board is particularly qualified to decide" (App. at 28a), the NLRA was found preemptive.[9] As was true with respect to *Serrano,* there were thus divergent results in *Rester Refrigeration* and the decision below in balancing the respective federal and state interests at issue.

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[9] As noted by the Fifth Circuit, "[t]he Court of Appeals for the Ninth Circuit has reached the same result in a similar case." App. at 23a, n.2, citing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.,* 779 F.2d 497 (9th Cir. 1985).

Serrano and *Rester Refrigeration* further demonstrate, therefore, the inappropriate accommodation between federal and state law reached by the Michigan courts in the present case. The conflict between those decisions and the views of the court below is an additional compelling reason to grant the petition for writ of certiorari.

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APPENDIX

DECISION OF SIXTH CIRCUIT IN SERRANO v. JONES & LAUGHLIN STEEL CO. (TEXT)

No. 84-3992

United States Court of Appeals

FOR THE SIXTH CIRCUIT

JOSEPH SERRANO, et al.,
Plaintiffs-Appellants,

v.

JONES & LAUGHLIN STEEL CO.,
LTV CORPORATION,
Defendants-Third Party Plaintiffs-Appellees,

INTERNATIONAL UNION, UNITED STEELWORKERS OF AMERICA, AFL-CIO; LOCAL NO. 2163, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Third Party Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed May 8, 1986

Before: LIVELY, Chief Judge; WELLFORD, Circuit Judge; and PORTER, Senior District Judge.*

* The Honorable David Porter, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

LIVELY, Chief Judge, delivered the opinion of the court, in which WELLFORD, Circuit Judge, joined. PORTER, Senior District Judge, (pp. 19-20) delivered a separate opinion concurring and dissenting.

LIVELY, Chief Judge. The principal question presented by this appeal is whether the National Labor Relations Board (NLRB or Board) has exclusive jurisdiction over a dispute between individual employees and their employer arising out of an agreement between the employer and the employees' union. The agreement provided for concessions by the employees if the employer should decide to modernize an old facility. The district court held that three causes of action pled by the plaintiffs, claiming fraud by the employer, were preempted by federal labor law, and dismissed them. The court further held, with respect to two additional causes of action, that the plaintiffs failed to demonstrate the existence of genuine issues of material fact, and granted summary judgment in favor of the defendants.

I.

A.

Prior to 1981 Jones & Laughlin Steel Co. (J&L) was a major employer in Youngstown, Ohio. As this court has previously noted, a recession in the steel industry in the 1970s hit Youngstown particularly hard. See *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (1980). In an effort to avoid a shutdown of J&L's Campbell Works coke plant, J&L and the United Steelworkers of America (the Union) negotiated and executed an agreement pertaining to rebuilding the coke batteries at the Campbell Works. The negotiations took place in June and July 1981, and the agreement was signed July 31, 1981. The agreement granted J&L the right to depart from the provisions of the basic collective bargaining agreement in certain matters of work practices,

manning and scheduling. J&L was to be allowed to implement some of these concessions "[e]ffective as of the date that Management announces its determination to rebuild Campbell Works Coke Batteries." Other provisions of the agreement were not to take effect until the batteries were actually rebuilt.

The preface of the agreement provides:

> The Management of the Company is in the process of deciding whether or not the Coke Batteries and associated facilities of the By Product Coke Department at the Campbell Plant should be reconstructed. It is recognized by the Company and the Union that a decision to rebuild the concerned facilities would result in enhanced employment opportunities for many employees, and, as these employees leave the work force, job opportunities for laid off employees and/or for unemployed residents of the Youngstown Area. While it is recognized that the final decision as to whether or not to invest the monies required to rebuild the concerned facilities rests solely with Management, the local parties, without intending any limitation on Management's rights under the terms of the Labor Agreement, hereby agree to the following in an effort to make a rebuilt Coke Making and By Product operation efficient and economical, thereby encouraging Management to invest the monies required to rebuild these facilities at the Campbell Plant.

Sixteen numbered paragraphs follow the preface. Some deal with the concessions to be implemented when J&L announced its decision to rebuild and some with those to take effect only if the coke plant is actually rebuilt. Paragraph 15 gives management the right to use outside contractors for the entire rebuilding project. Paragraph 16 states:

> The provisions of this Agreement shall be effective only if Management announces its determination to rebuild

> Campbell Works Coke Batteries. In the event such a project is not approved, the above provisions are void and will not be referred to by either party in any current or future issue.

The basic collective bargaining agreement referred to in the preface reserved solely to J&L the decision to close or discontinue a plant permanently.

B.

The agreement was ratified by the union members at meetings on July 11 and 13. Local officials of J&L spoke with groups of workers at these meetings, urging ratification. Plaintiffs claim that the plant superintendent promised that if the Union accepted the concessions, the plant would remain open. On July 18 the board of directors of LTV Corporation, corporate parent of J&L, approved an expenditure of $151,000,000 to rebuild the Campbell Works coke batteries. On July 22, 1981 LTV issued a press release that stated in part:

LTV ANNOUNCES PLANS FOR ADDITIONAL $315 MILLION IN STEEL CAPITAL

> . . . The first coke oven battery scheduled for rehabilitation at Youngstown, number 8 battery, will be in operation in 22 months. Number 7 coke oven battery will be in full production in 42 months.

The press release also quoted a statement by Thomas C. Graham, head of the LTV steel group and chief executive officer of J&L:

> "The decision to rebuild the two Youngstown batteries was aided by a recently signed agreement with the local union of the United Steelworkers of America," Mr. Graham said. "The agreement will maximize the effective use of manpower on the batteries following the rebuild."

The concessions triggered by J&L's announcement of its intent to rebuild the coke plants were implemented. Between July 22, 1981 and January 1983 J&L spent approximately $12,000,000 to demolish and rebuild coke battery number 8. In November 1982 J&L notified the Union that it had decided to discontinue operation of the existing Campbell Works coke batteries by December 31, 1982. Thereafter, in accordance with requirements of the collective bargaining agreement, J&L advised the Union that it intended to close the Campbell Works coke plant permanently. Coke production ceased on February 4, 1983.

The Union filed a grievance, but pursued it through only three of the five steps provided for in the collective bargaining agreement. The grievance charged J&L with violating the July 1981 agreement as well as certain provisions of the underlying collective bargaining agreement. As relief the grievance demanded that J&L reopen the coke plant and abide by the July agreement or, in the alternative, make each affected employee whole for wages and benefits until his date of retirement at age 65. At the third stage of the grievance proceedings the Union charged that J&L had not intended to rebuild the Campbell Works coke batteries.

II.

A.

When the Union terminated the grievance without taking it to binding arbitration, 133 former J&L Campbell Works employees filed the present action in an Ohio court. Following removal to the United States District Court for the Northern District of Ohio, the plaintiffs filed a first amended complaint which set forth the five causes of action previously referred to. In the first three causes the plaintiffs charged J&L, respectively, with fraud in the announcement of the decision to rebuild the coke plant, fraud in the execution of the announced plan to

rebuild, and fraud in negotiations with the Union at other coke plants. The fourth and fifth causes alleged negligent performance of contractual duties under the July agreement and breach of that agreement. The first four causes of action were presented as pendent state law claims. The plaintiffs asserted jurisdiction under section 301 of the National Labor Relations Act, as amended, 29 U.S.C. § 185 (1982), with respect to the fifth cause of action. The plaintiffs did not sue the Union. However, J&L did bring the Union in as a third-party defendant, alleging that if the plaintiffs should be found entitled to damages, the Union would be liable for any amount by which damages were increased by the Union's breach of its duty of fair representation.

The fraud claims were based on the assertion that, despite its unequivocal statements of intent to rebuild the coke plants, J&L actually intended to do so only if if it could obtain an extension from the United States Environmental Protection Agency (EPA) of deadlines for bringing the Campbell Works into compliance with Clean Air Act requirements. Union representatives were told in November 1982 that J&L planned to close the Campbell Works. This was before the EPA made a final decision. On December 29, 1982 EPA denied J&L's application for a discretionary extension and less than one month later J&L announced its abandonment of plans to rebuild the plants. The fourth cause of action merely charged J&L with failure to exercise due care to perform all aspects of the July agreement and the fifth claimed that the decision to close the coke plants permanently violated the agreement.

B.

The district court found that the plaintiffs had stated the first three causes of action as state fraud claims in an attempt to circumvent the exclusive jurisdiction of the NLRB. Referring to the guidelines set forth by the Supreme Court in *San Diego*

Building Trades Council v. Garmon, 359 U.S. 236 (1959), the district court concluded that the conduct which the plantiffs sought to have remedied under state law was arguably prohibited under the Labor Act as failure to bargain in good faith. This being so, the claims for relief from J&L's alleged misconduct were within the exclusive jurisdiction of the Board.

> Clearly, the manifest underlying basis for the terms negotiated in the Memorandum of Agreement of July 13, 1981, was the continuation of coke operations at the Campbell plant. J&L bargained for and obtained concessions from the Union "to encourage Management to invest monies required to rebuild the facilities at the Campbell plant." Since the duty to bargain unquestionably extends beyond the period of contract negotiations, defendant had the duty to disclose any information they had concerning a shutdown of the Campbell plant as it related to the concessions made in the Memorandum of Agreement during the entire period of that agreement. Failure to make the disclosures would constitute a failure to bargain in good faith.
>
> Thus, plaintiffs' claims in the first three causes of action that defendants failed to provide them with information relating to whether the Campbell plant would close while still taking advantage of the concessions negotiated in the Memorandum of Agreement involve conduct which is arguably prohibited under the NLRA.

District Court Memorandum Opinion, App. 86.

The district court recognized that plaintiffs were also claiming fraud in J&L's failure to disclose information about closing the Campbell Works or in misleading the Union as to their true intentions, aside from the understanding contained in the July agreement. However, the court found that this conduct, if proven, would be covered by the employer's duty to bargain about the effects of its decision to shut down the Campbell Works. Again, any failure to disclose or any

affirmative misrepresentations about the decision arguably would be prohibited by the Labor Act as bad faith bargaining.

The district court granted summary judgment as to the fourth and fifth causes of action. The court found that the fourth cause of action, though pled as a state claim for negligent performance of a contract, was subject to the federal common law developed under section 301 of the Labor Act. Thus, it treated the fourth and fifth causes together as actions for breach of a labor contract. The court determined that the claimed breach of contract consisted of J&L's permanent closure of the Campbell Works. Since the July agreement unequivocally reserved to J&L the sole decision whether to close the plant, the district court found no genuine issue of material fact with respect to the alleged breach. The complaint was dismissed in its entirety. The district court also dismissed the third-party complaint against the Union as moot. The plaintiffs have appealed.

III.

On appeal the plaintiffs argue that the fraud claims were not preempted "because the controversy presented under state law is not identical to that which could have been presented to the NLRB." They also maintain that even if these claims could have been presented to the NLRB, they came within an exception to the preemption doctrine as claims that "touch interests so deeply rooted in local feeling and responsibility that no Congressional intent to preempt can be inferred."

In *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959), the Supreme Court stated that when it is not clear whether activity sought to be brought under state regulation is protected by section 7 of the Labor Act, or prohibited under section 8, or is outside the coverage of both sections, the

Board rather than the courts must make the determination. The Court continued:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245.

In *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 285-91 (1971), the Court reviewed the reasons for application of the judicial doctrine of preemption in the area of labor law. Writing for the court, Justice Harlan summarized the rationale for preemption as follows:

> The rationale for pre-emption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system. Thus, that a local court, while adjudicating a labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent.

Id. at 288-89 (footnote omitted).

Though the Court found that *Lockridge* presented a clear case for application of preemption under *Garmon's* "arguably protected by § 7 or prohibited by § 8 of the Act" guideline, the Court did set forth three exceptions to the *Garmon* rule. One of

the exceptions is the basis of the plaintiffs' second argument—a situation where it cannot be presumed that Congress intended "to intrude so deeply into areas traditionally left to local law." *Id.* at 297.

The Court refined *Garmon* further in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180(1978). A state court enjoined peaceful picketing on Sears property that constituted a continuing trespass under California law. In upholding the injunction the Supreme Court noted that the matter which the state court sought to regulate was the location of the pickets, not the question of whether the picketing was protected activity. *Id.* at 187. Cautioning against a literal, mechanical application of *Garmon,* the Court prescribed a balancing approach when the activity sought to be subjected to state control is only arguably, as opposed to "clearly", subject to section 7 or 8 of the Labor Act. *Id.* at 187-88.

In "local interest" cases involving conduct arguably prohibited by section 8, two factors control the preemption decision. There must exist "a significant state interest in protecting the citizen from the challenged conduct." If this condition exists, even though the challenged conduct occurs in the course of a labor dispute, preemption is not required if state jurisdiction "entail[s] little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable federal violation and the state tort [arise] in the same factual setting, the respective controversies presented to the state and federal forums would not [be] the same." *Id.* at 196-97 (footnote omitted). The next paragraph of the opinion refers to identical controversies, language which the plaintiffs have relied upon in their first argument:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been,

> but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Id. at 197 (footnote omitted).

The Court concluded that the "primary jurisdiction" rationale for preemption was not sufficient to oust the state court of jurisdiction over the trespass action. The state court could determine that the location of the picketing violated state trespass laws without a significant risk of interference with the Board's uniform enforcement of the provisions of the Labor Act.

In *Local 926, International Union of Operating Engineers v. Jones,* 460 U.S. 669 (1983), the Supreme Court reviewed its "approach to the pre-emption issue," as it had "stated and restated" it in earlier opinions:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra,* at 245; see *Sears, supra,* at 187-190. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion," *Sears, supra,* at 188, if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily pre-empted, *Farmer, supra,* at 296. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra,* at 243-244. The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the

> regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens.

Id. at 676 (citations and footnote omitted).

In *Engineers v. Jones,* the question was whether an action by a discharged employee against a union for tortious interference with his employment contract, and against the employer for breach of that contract, was preempted. The state court held that it had a deep and abiding interest in its citizens' contractual rights and that the tort action was so unrelated to the concerns of federal labor laws that the state action would not interfere with the administration of that law. After conducting the required balancing the Supreme Court disagreed, finding that the action affected arguably protected conduct. The Court emphasized the dual nature of preemption in the field of labor law. In addition to protecting "the exclusive jurisdiction of the Board over matters arguably within the reach of the Act," it requires "the substantive pre-emption by the federal labor law in the area to which it applies." *Id.* at 680. The Court concluded that the plaintiff's cause of action against the union for tortious interference with contractual relations was not of merely peripheral concern to federal labor policy.

More recently the Supreme Court has dealt with preemption in an unusual setting. In *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983), Belknap hired replacement workers during a strike, promising them that they would not be discharged to accommodate returning workers at the end of the strike. The striking union brought unfair labor charges and Belknap filed counter-charges with the NLRB. As part of a settlement of all charges Belknap agreed to reinstate returning strikers. As a

result of this agreement, Belknap laid off the replacements. When the lay-offs became final terminations the replacements sued Belknap in state court for misrepresentation and breach of contract. The Kentucky Court of Appeals reversed the trial court's entry of summary judgment for Belknap, holding that preemption was not required since the employer's activities were not an unfair labor practice and the misrepresentation and contract claims were of only peripheral concern to federal labor law, while deeply rooted in local law. The Supreme Court of the United States granted certiorari and affirmed.

The Supreme Court held that even though Belknap's offer of permanent employment to the replacements arguably would have been an unfair labor practice, the actions for fraud and breach of contract were not preempted. The controversy between Belknap and the replacements could not be said to be identical to that between Belknap and the strikers. The focus of the Board in determining whether Belknap had committed unfair labor practices as charged by the union "would be on whether the rights of strikers were being infringed. . . . The Board would be concerned with the impact of strikers not with whether the employer deceived replacements." *Id.* at 510. On the other hand, in the state court action, the focus would be on the rights of the replacements. The Court found that permitting the state action "would not interfere with the Board's determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the Board and the federal law. At the same time, Kentucky surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm." *Id.* at 510-11. In addition, the Board could not have awarded relief to the replacements.

IV.

The district court properly held that the three fraud claims concerned conduct arguably prohibited by the Labor Act. Section 8(d) requires an employer to bargain in good faith with respect to "wages, hours and other terms and conditions of employment," 29 U.S.C. § 158(d). No matter how it is stated, the gravamen of the three fraud charges is that J&L did not bargain in good faith in obtaining concessions from the Union in the July agreement. To the extent that plaintiffs claim fraud unrelated to the July agreement, the same principles apply. The plaintiffs appear to argue that J&L fraudulently misled them after the agreement had been made in deciding to close the coke plants. This claim also implicates a section 8(d) duty. Though J&L retained the sole right to decide that the Campbell Works should be closed, it had a duty to bargain in good faith over the effects of that decision. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 677 n.15 (1981). In an attempt to show that they are not pursuing an unfair labor practice claim, plaintiffs argue that J&L's conduct was not a refusal to bargain over the effects of a plant closure since the company complied with the requirement of the collective bargaining agreement that required 90 days notice in advance of the shutdown. Nevertheless, whether classified as a violation of the general duty to bargain in good faith or the more particular duty to bargain over the effects of a plant closure, the conduct about which plaintiffs are complaining was arguably a violation of section 8. This conduct is continuing to take advantage of the concessions without revealing the likelihood of a shutdown.

Failure of an employer to bargain in good faith about terms and conditions of employment is not peripheral to the concerns of federal labor law; rather, it strikes at the heart of one of the basic concerns of that law. Unless the fraud claims bring this case within an exception, the *Garman* preemption

doctrine applies. We do not believe this case comes within the exception relied upon by the plaintiffs. Preemption by federal law of these claims would not "intrude so deeply into areas traditionally left to local law" as to upset the traditional federal-state balance. *Motor Coach Employees v. Lockridge,* 403 U.S. at 297. The examples of such deep intrusion cited by the Court in *Lockridge* involved libel, *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966), and mass picketing and threats of violence, *United Automobile Workers v. Russell,* 356 U.S. 634 (1958), both unprotected union activity. The alleged misconduct of J&L is not of the same order.

The plaintiffs argue that *Belknap v. Hale* supports their position. It is true that *Belknap* permitted a state court action for alleged employer misrepresentations to employees. However, *Belknap* is distinguishable on several grounds. Most importantly, the Court found that the strikers and the replacements had controversies with Belknap that were not identical. The NLRB could deal with the claims of the strikers, and the state court could deal with those of the replacements without infringing in any way upon the Board's exercise of its jurisdiction. "The interests of the Board and the NLRA, on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other, are 'discrete' concerns." 463 U.S. at 512 (citation omitted). Just as the controversies in *Belknap* were not identical, the Board could not provide a remedy to the replacements. Its treatment of the strikers' claims for back wages and restoration of benefits would not be affected by any relief in damages that the replacements might obtain in their state court action.

Applying the step-by-step process outlined in *Engineers v. Jones,* we have first determined that the conduct that the plaintiffs seek to have regulated under state law is arguably prohibited by the Labor Act. This being so, applicable state law and procedures ordinarily will be preempted. We also have determined that the conduct at issue is not "a mere peripheral concern of the Act." Since the plaintiffs assert that

their claims involve interests so deeply rooted in local feeling and responsibility as to rule out any congressional intent to preempt state law, we are required to engage in a "sensitive balancing." 460 U.S. at 676.

When the proper balancing of interests is undertaken, it is clear to us that the concern with the substantive rights created and protected by federal law outweighs any interest the state might have in protecting its citizens from fraud and misrepresentations. There is only one group of employees in the present case and the conduct about which they complain deeply implicates employer-employee relationships. Since it is conceded that J&L cannot be required to reopen the Campbell Works, any remedy for J&L's conduct will involve back wages and continuation of benefits or compensation for the value of the concessions. These are precisely the forms of relief requested by the Union in its grievance. Unlike *Belknap*, this is not a case involving discrete controversies. In its essence the controversy presented to the court is identical to the one that could be presented to the NLRB in an unfair labor practice complaint. While the state has an interest in protecting its citizens from misrepresentations, we believe this interest is properly overriden by the need to enforce a uniform federal labor law.

V.

Federal courts have jurisdiction under section 301 of the Labor Act over suits to enforce collective bargaining agreements. This is true even when the employer's conduct is arguably covered by section 7 or 8. *Motor Coach Employees v. Lockridge*, 403 U.S. at 298; *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517, 522 (6th Cir. 1985). Thus, the district court properly did not apply the *Garmon* preemption tests to the fourth and fifth causes of action pled by

the plaintiffs. Nevertheless, the district court granted summary judgment for J&L on both claims.

A.

The plaintiffs contend that the fourth cause of action should have been treated as a separate tort claim and not "collapsed" into the fifth cause which admittedly was a breach of contract claim under section 301. The plaintiffs argue that the fourth cause set forth a separate claim for breach of the common law duty to perform a contract with ordinary care and skill. The district court adopted the reasoning of the court of appeals in *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre,* 647 F.2d 372 (3rd Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). In *Wilkes-Barre,* the court held that district courts have jurisdiction under section 301 over claims for tortious interference with labor contracts and that federal common law controls. We belive the same reasoning applies to claims for negligent performance of a labor contract. The fourth and fifth causes of action both involve claims for violation of the terms of a collective bargaining agreement. The plaintiffs have not presented a tort claim that is independent of any section 301 contract claim. See *Allis-Chalmers Corp. v. Lueck,* ____ U.S. ____, 105 S.Ct. 1904 (1985), and *Gibson v. A.T.&T. Technologies,* ____ F.2d ____, 121 LRRM 2626 (7th Cir. 1986).

B.

The district court held that the July agreement, like the basic collective bargaining agreement, unambiguously reserved to J&L the sole right to determine whether to keep the Campbell Works open or to close them. The plaintiffs argued that the agreement reserved this right to J&L only until its decision on rebuilding the coke plants was announced. They

contend on appeal that summary judgment was improper because they put forth a plausible interpretation of the agreement and thus created an issue of fact. They seek to reply on extrinsic evidence to support their interpretation, relying on this court's recent statement that "[t]he intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion." *United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). This statement was made in the context of the court's discussion of an agreement found to be ambiguous and after the court had stated that "the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent." *Id. Yard-Man* did not change the rule stated by this court in *Local 783, Allied Industrial Workers v. General Electric Co.*, 471 F.2d 751, 757 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973):

> It is true that there is generally broad latitude in the admissibility of bargaining history to construe a collective bargaining agreement. But where the meaning of the clause in question is clear, no construction is necessary.

We have examined the cases cited by the plaintiffs in support of their contention that J&L had somehow surrendered it clearly stated right to decide whether to cease operations at the Campbell Works and have found none of them persuasive. As this court stated in *Local 1330, United Steelworkers v. United States Steel Corp.*, 631 F.2d 1264, 1280 (6th Cir. 1980), there is no legal basis for this court's ordering an employer to continue operations which it has determined to discontinue for economic reasons. The plaintiffs do not dispute that the decision to close the Campbell Works was based on economic considerations. The July agreement not only failed to bind J&L to continue operations of the coke plant; it explicitly provided that J&L could determine whether to invest more money there to rebuild the plant and reserved to J&L the sole right to decide whether

the plant would be closed. We believe the district court was correct in concluding that the memorandum in question, including its preface, reinforced and "expressly preserved defendants' unilateral right set forth in the basic Labor Agreement to close the Campbell plant." The plantiffs presented no genuine issue of material fact with respect to the claim for breach of the July agreement.

The judgment of the district court is affirmed.

PORTER, Senior District Judge, dissenting in part. We write separately to briefly express our dissent from Part V of the Court's well-reasoned opinion. While we agree that a § 301 action is not available on these facts to force the defendants to keep the plant open, *see, Textile Workers Union v. Darlington Manufacturing Corp. v. NLRB,* 380 U.S. 263 (1983); *Fraser v. Magic Chef-Food Giant Markets, Inc.,* 324 F.2d 853, 856 (6th Cir. 1963), we think the majority overlooked plaintiffs' alternative request for relief.

In the complaint, plaintiffs' fourth claim for relief requests ". . . the value of concessions implemented by defendants during the period July 1981 to February 1983." We believe there is a genuine issue of material fact whether the memorandum of agreement permits the plaintiffs such relief. Certainly as a matter of fairness it would seem that defendants' implementation of concessions upon the "announcement" of its intention to keep the plant open, should obligate it to return the concessions in the event the plant is closed. In any case, we believe the contract is ambiguous on this point, and can only be interpreted with extrinsic evidence. *See UAW v. Local 134 v. Yard-Man, Inc.,* 716 F.2d 1476 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1002 (1984).

Our reading of the record at least raises a question in our mind that the Memorandum of Agreement entitled plaintiffs the value of concessions arguably given in exchange for the continued operation of the plant. Typical of this point is the

following paragraph which appeared in a July 1981 edition of *Update,* a Jones & Laughlin in-house publication.

> "The decision to rebuild the two Youngstown batteries was aided by a recently signed agreement with the local union of the United Steelworkers of America," Mr. Graham said. "The agreement will maximize the effective use of manpower on the batteries following the rebuild."

Tr. at 119.

Also, the record contains copies of notes taken by company negotiators apparently during discussions concerning the proposed Agreement. One negotiator wrote the following:

> Union knows we're looking at rehab—knows the big problem is the money. They may think either stringing along—last year got agreement to cut crews to keep #8 operating—then plant #8 down anyway.

Tr. at 155.

The evidence is not explicit, but we think it is sufficient to create an issue of material fact that the Memorandum of Agreement entitles plaintiffs the value of concessions implemented upon the announcement of defendants' intention to rebuild the Campbell Coke Plant.

DECISION OF FIFTH CIRCUIT IN U.A. 198 HEALTH AND WELFARE, EDUCATION & PENSION FUNDS v. RESTER REFRIGERATION SERVICE, INC. (TEXT)

United States Court of Appeals

FOR THE FIFTH CIRCUIT

U. A. 198 HEALTH & WELFARE, EDUCATION & PENSION FUNDS.
Plaintiff-Appellant.

v.

RESTER REFRIGERATION SERVICE, INC.,
Defendant-Appellee.

No. 85-3453
OPINION

Filed May 23, 1986

Before: John Minor Wisdom, Thomas M. Reavley, and Sam D. Johnson, Circuit Judges

Opinion by Judge John Minor Wisdom

Appeal from the United States District Court
for the Middle District of Louisiana
John V. Parker, Chief Judge, Presiding

OPINION

JOHN MINOR WISDOM, Circuit Judge:

This appeal presents the question whether federal courts have subject matter jurisdiction over an action by a union trust fund, under the Employee Retirement Income Security Act of 1974 (ERISA), against the employer to collect unpaid contri-

butions accruing after the expiration of a collective bargaining agreement. We hold that the National Labor Relations Act preempts the fund's ERISA action. The National Labor Relations Board has "primary jurisdiction" to decide the basic issue.[1] The Court of Appeals for the Ninth Circuit has reached

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[1] We use the term "primary jurisdiction" in the sense in which the United States Supreme Court used it in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959). "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . . " 359 U.S. at 245.

In this opinion, the term "primary jurisdiction" is used to refer to the various considerations articulated in Garmon and its progeny that militate in favor of pre-empting state-court jurisdiction over acitvity which is subject to the unfair labor practice jurisdiction of the federal Board. This use of the term should not be confused, with the doctrine of primary jurisdiction, which has been described by Professor Davis as follows:

"The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court."

"The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue."

3 K. Davis, Administrative Law Treatise § 19.01, p 3 (1958) (emphasis in original).

While the considerations underlying Garmon are similar to those underlying the primary-jurisdiction doctrine, the consequences of the two doctrines are therefore different. Where applicable, the Garmon doctrine completely pre-empts state-court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act.

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199, n.29 (1978).

the same result in a similar case.[2]

I.

The plaintiffs, United Association Local 198 Health & Welfare, Education & Welfare Funds (Funds), are employee benefit trust funds established under collective bargaining agreements between Local Union 198, representing plumbers and pipefitters in the Baton Rouge area, and various pipefitting and plumbing contractors. Rester Refrigeration, Inc. was obligated to contribute to the Funds under a collective bargaining agreement between Local 198 and Associated Mechanical Contractors of Baton Rouge. Rester stopped contributing to the Funds when the agreement expired on April 30, 1984. Rester takes the position that its obligation to contribute ended on April 30 because its contract negotiations with Local 198 had reached an impasse on that date. The Funds dispute whether negotiations were at an impasse on April 30.

The Funds sued in district court to recover contributions allegedly due after the contract expired but before any impasse. The complaint alleges jurisdiction under § 301(a) of the Labor Management Relations Act,[3] and §§ 502 and 515 of ERISA.[4] The district court held that it lacked subject matter jurisdiction under either statute and dismissed the action.[5] On appeal, the Funds have abandoned their argument under § 301(a) of the Labor Management Relations Act.

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[2] *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985); *see also Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office, Inc.*, 783 F.2d 919 (9th Cir. 1986).

[3] 29 U.S.C. § 185(a).

[4] 29 U.S.C. §§1132, 1145.

[5] *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 612 F. Supp. 1033 (M.D. La. 1985).

II.

An employer must honor the terms and conditions of an expired collective bargaining agreement until a new agreement is reached or until contract negotiations offer no hope of reaching an agreement.[6] Failure to honor an expired agreement before impasse is an unfair labor practice under §§ 8(a)(1) and (5) of the National Labor Relations Act (NLRA).[7] On the merits, therefore, this dispute will turn on whether negotiations between Rester and Local 198 had reached an impasse by April 30.

Perhaps no principle of labor law is better established than that the Board should make the initial determination whether challenged action constitutes an unfair labor practice. "As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.' "[8]

Congress has, however, created exceptions to the general principle that the NLRA has primary jurisdiction over unfair labor practice claims. For example, parties may sue in federal court to enforce collective bargaining agreements under § 301(a) of the Labor Management Relations Act.[9] Because

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[6] *NLRB v. Katz,* 369 U.S. 736, 743 (1962).

[7] 29 U.S.C. §§ 158(a)(1), (5). *NLRB v. Haberman Construction Co.,* 641 F.2d 351, 357 (5th Cir. 1981) (en banc).

[8] *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83 (1982), *quoting San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959).

[9] Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

the Funds do not challenge the district court's holding that it lacks jurisdiction under § 301(a), we do not decide that question.[10]

As an important exception, ERISA permits trust funds to sue employers for certain unpaid contributions to the fund. Section 515 of ERISA provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[11]

Section 502(a)(3) of ERISA authorizes civil actions in federal district court to collect unpaid contributions due under § 515.[12] The parties agree that ERISA authorizes union trust funds to

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[10] The district court reasoned that failure to honor contract terms after the contract expires is not a violation of the contract cognizable under § 301(a). The employer's obligation to contribute to the Funds from the date the contract expires to the date of impasse is created by statute rather than by contract. The district court adopted the reasoning of *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F. Supp. 942 (N.D. Cal. 1981), *aff'd*, 692 F.2d 641 (9th Cir. 1982).

[11] 29 U.S.C. § 1145.

[12] Section 502 provides in part:

> A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

sue in federal court for contributions accruing while the collective bargaining agreement remains in force. The Funds contend that the statute also authorizes suits for contributions accruing after the collective bargaining agreement has expired, because negotiations had not come to an end.

III.

We find little guidance in the language or the legislative history of the Multiemployer Pension Plan Amendments Act of 1980.[13] Elsewhere in the Act, the "obligation to contribute" is defined as "an obligation . . . arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law."[14] The statute provides no other definition. We decline to engraft the definition of § 4212 onto § 515. Section 515 applies to employers "obligated to make contributions . . . under the terms of a collectively bargained agreement." Congress was aware of the fact that obligations to contribute to employee trust funds arise under labor law as well as under collective bargaining agreements.[15] Had Congress intended to cover both classes of obligations in § 515, the most natural and effective way to express that intent would have been to duplicate the language of § 4212 in § 515. That Congress did not do so indicates that it did not intend § 515 to apply to obligations created by the labor statutes.

Congress enacted § 515 because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses

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[13] Pub. L. 96-364, 94 Stat. 1295, 29 U.S.C. § 1001 et seq.

[14] ERISA § 4212, 29 U.S.C. § 1392(a). Section 4212 defines "obligation to contribute" "[f]or purposes of this part". Section 4212 therefore refers to Subchapter III, Subtitle E, Part I of ERISA, headed "Employer Withdrawals". Section 515 is located in Subchapter I, Subtitle B, Part 5 of the statute.

[15] 29 U.S.C. § 1392(a).

unrelated to the employer's promise and the plans' entitlement to the contributions."[16] We find in the legislative history no convincing evidence that Congress considered the application of § 515 to obligations accruing after an agreement expires.[17]

We would require plain language in the statute or compelling reasons in the legislative history to depart from the primary jurisdiction accorded the NLRB. The key issue on the merits is whether the parties have reached an impasse. To resolve this issue, the fact-finder must consider a variety of factors such as the bargaining history, the importance of the issue or issues on which the parties disagree, a number of meetings between the parties, the length of the meetings, and the amount of time elapsed since negotiations began.[18] The outcome often turns on slight factual differences. Because of its

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[16] Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980); *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 87 (1982).

[17] Both sponsors of the bill stated that it "imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans". 126 Cong. Rec. 23039 (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Williams). The Commitee Print states that § 515 is intended to prevent "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Comm. on Labor and Human Resources, 96th Cong., 2nd Sess. at 44 (Comm. Print 1980). The statements in the Congressional Record, taken alone, might be viewed as supporting the Fund's position. The statement in the Committee Print, taken alone, might be viewed as supporting the employer's position. We decline to attach great significance to either statement.

[18] *See* R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 448 (1976).

specialized expertise, the Board is particularly qualified to decide such a question.

* * *

Our decision today does not foreclose the Funds from obtaining relief by filing an unfair labor practice charge with the Board.

The judgment of the district court is AFFIRMED without prejudice to the plaintiffs' right to assert its claim before the National Labor Relations Board and to take future appropriate action in the courts.

FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 85-1731

In The

Supreme Court of the United States

October Term, 1986

AUTOMOBILE CLUB OF MICHIGAN,
AUTO CLUB INSURANCE ASSOCIATION,
AUTO CLUB CASUALTY INSURANCE COMPANY,
AUTO CLUB GROUP INSURANCE COMPANY,
and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER,
FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN,
DANIEL PICANO, JOHN ROBBINS, and CARL KOLP,
On Behalf Of Themselves And On Behalf Of The Class
Of All Sales Representatives Of The Defendants
in the Counties of Wayne, Macomb and Oakland,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

WHEN A PURPORTED IMPASSE OCCURS IN THE NEGOTIATIONS FOR A FIRST COLLECTIVE BARGAINING AGREEMENT, MAY THE EMPLOYER UNILATERALLY VOID PRE-EXISTING INDIVIDUAL EMPLOYMENT CONTRACTS BY DEPRIVING A STATE COURT OF JURISDICTION TO ENFORCE SUCH INDIVIDUAL CONTRACTS ON THE PURPORTED GROUNDS THAT THE NATIONAL LABOR RELATIONS ACT, 29 USC § 151 *ET SEQ.*, PREEMPTS SUCH STATE COURT JURISDICTION?

The Petitioners Answer "Yes."

The Respondents Answer "No."

The Michigan trial court Answered "No."

The Michigan Court of Appeals Answered "No."

The Michigan Supreme Court declined review.

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No. 85-1731

In The

Supreme Court of the United States

October Term, 1986

AUTOMOBILE CLUB OF MICHIGAN,
AUTO CLUB INSURANCE ASSOCIATION,
AUTO CLUB CASUALTY INSURANCE COMPANY,
AUTO CLUB GROUP INSURANCE COMPANY,
and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER,
FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN,
DANIEL PICANO, JOHN ROBBINS, and CARL KOLP,
On Behalf Of Themselves And On Behalf Of The Class
Of All Sales Representatives Of The Defendants
in the Counties of Wayne, Macomb and Oakland,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

COUNTER-STATEMENT OF FACTS

At various points prior to 1978, the Automobile Club of Michigan (the "Auto Club") hired the plaintiffs as commissioned Sales Representatives. A.6. At the time of hire, the Auto Club agreed not to discharge or demote the particular Sales Representative without just cause. A.7. In January, 1982, however, the Auto Club did discharge or demote the plaintiffs, claiming that they had

failed to meet certain minimum sales quotas which had first been promulgated in August, 1981. A.7-8. In a four-count complaint, the plaintiffs alleged, inter alia, that the Auto Club had breached its contract with them, since violations of the minimum sales quotas did not constitute cause under the individual employment contracts with the Auto Club. A.7.

In response to the plaintiffs' complaint, the Auto Club moved for accelerated judgment under Michigan's General Court Rule 116.1(2). In relevant part,[1] the Auto Club asserted that state court jurisdiction over the breach of contract claim was preempted by the National Labor Relations Act, 29 USC § 151 *et seq.* (the "NLRA" or "the Act"), because the sales quotas had been unilaterally implemented by the Auto Club following an impasse in collective bargaining with the Michigan AAA Sales Association. That union had been certified on February 9, 1978 — that is, after the individual plaintiffs and the Auto Club had consummated their individual contracts of employment. A.6. It was subsequently decertified.

In considering the Auto Club's motion for accelerated judgment, the state courts, as is proper under Michigan procedure, assumed that the well-pled allegations of the plaintiffs' complaint were true. A.8, 21. On the basis of those assumptions, the trial court denied the Auto Club's preemption claim. After granting an application for leave to appeal from this interlocutory order, the Michigan Court of Appeals unanimously affirmed. The Court of Appeals then denied a motion for rehearing

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[1] The Auto Club asserted nine other grounds purportedly requiring dismissal of all or part of the plaintiffs' complaint. The order at issue on this petition did not reach those other grounds. As of this date, there has been no ruling on any other aspect of the Auto Club's motion.

and the Michigan Supreme Court denied the delayed application for leave to appeal because it was "not persuaded that the questions presented should now be reviewed by this court." A.2.

REASONS FOR DENYING THE WRIT

This Court should deny the writ for two reasons. First, as will be shown below, the precise issue presented here is exceedingly narrow — so narrow, in fact, that it has *never* arisen before. And second, the principle petitioners champion — *i.e.*, the supposed right of a party to ignore its own prior contractual commitments — has been definitively repudiated by this Court on several occasions.

I.

Petitioners do not dispute that the enforcement of individual contracts for employment has long been with the states. *Perry* v *Sinderman*, 408 U.S. 593, 602 n.7 (1972). Nor do petitioners contend that the mere advent of a union would disturb these contracts. Nor, for their part, do respondents dispute that a collective bargaining contract would ordinarily supersede individual agreements. *J.I. Case* v *NLRB*, 321 U.S. 332 (1943). The dispute here is limited to one extremely narrow issue: the ability of the employer to void pre-existing individual employment contracts after a union has been certified and has bargained to impasse but before it has reached even a first collective bargaining agreement.[2]

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[2] This case does not present the different question of an employer's power to repudiate pre-existing individual contracts after the expiration of one or more collective bargaining agreements. *Cf. J.D. Alexander* v *Standard Oil Co.*, 53 Ill. App. 3d 690, 368 NW2d 1010 (5th Dist. 1977).

Petitioners suggest that the decision below "threatens to severely dislocate national labor policy."[3] (Pet. at 12) And yet neither petitioners nor respondents have uncovered a single other case from any jurisdiction in the last forty years, which even addresses the issue of post-certification, pre-first-contract enforcement of valid individual employment contracts. Nor is that surprising, for it is unusual for an employer to have individual contracts with employees and it is truly extraordinary for an employer to then use an impasse in collective bargaining as the occasion for breaching those contracts.

In fact, the complete dearth of lower-court precedent on point is highlighted by petitioners' incorrect claim that the decision below conflicts with *National Metalcrafters*

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[3] Petitioners make much of the fact that Michigan, along with several other states, has recently changed its substantive requirements for finding binding individual contracts for employment. (Pet. at 10-11) For example, written and signed bilateral agreements are no longer required. *Toussaint* v *Blue Cross*, 408 Mich 579, 292 NW2d 880 (1980).

This observation, while correct, has absolutely no bearing on the federal question posed here. The question here is whether state court enforcement of pre-certification individual contracts is preempted in the absence of a first collective bargaining agreement. The state law regarding what sort of evidence will be required to establish the existence of an individual contract is simply irrelevant.

Moreover, the petitioners are simply wrong in asserting that "[i]f the decision below is allowed to stand, juries, not the NLRB, will become the final arbiter as to whether . . . an employer permissibly exercised its NLRA economic self-help measures in response to a good faith bargaining impasse." (Pet. at 11-12) Should the present case go to trial on plaintiffs' *Toussaint* claim, the fact finder would be asked to determine whether petitioners' pre-certification statement or conduct gave rise *to an enforceable contract of employment*. No NLRA questions of "good faith" or "impasse" or "self-help" would be implicated in the state court suit.

Finally, while it is not relevant here, petitioners in fact far overstate the significance of *Toussaint*. That case clearly leaves employers the option of not making contractual commitments to employees, and that option is being utilized more and more frequently. *See, e.g., Reid* v *Sears, Roebuck & Co.*, __ F2d __, 122 LRRM 2153 (6th Cir 1986).

v *McNeil* (*"Keystone"*), 784 F2d 817 (7th Cir 1986). In *Keystone*, a number of employees attempted to use an Illinois law to compel payment of benefits provided for in a collective bargaining agreement which had expired and which the employer contended he had lawfully modified following a bargaining impasse in such a way as to eliminate the obligation to pay the benefits in question. The Seventh Circuit held that the employees' attempt to use the state law to determine rights under the agreement was preempted by section 301 of the Labor-Management Relations Act of 1947, 29 USC § 185, and by the branch of the labor preemption doctrine formulated in *San Diego Building Trades Council* v *Garmon*, 359 U.S. 236 (1959).

Neither of the grounds on which the court relied in *Keystone* is applicable here. Section 301 cannot preempt the instant case for the simple reason that in the present case respondents asked the state to enforce, not a collective bargaining agreement, but pre-certification individual contracts, which are traditionally subject to state jurisdiction. Moreover, an argument based on *Garmon* is unavailable — and petitioners have properly refrained from raising such an argument — because there is no allegation that the employer's conduct here is either protected or prohibited by Section 7 or Section 8 of the NLRA.

After exhaustive research, the petitioners *and* the respondents have found only one other lower-court precedent which is even related to the questions presented here. *See J. D. Alexander* v *Standard Oil Co.*, 53 Ill. App. 3d 690, 368 NW2d 1010 (5th Dist. 1977). As here, the court concluded that otherwise enforceable individual contracts did not become unenforceable merely because the employer had bargained to impasse with the union.

Alexander, however, did not address the precise issue presented here, since it did not involve pre-first contract negotiation and since it involved the relatively rare situation where the collective bargaining agreement incorporated individual "side agreements." Even so, *Alexander* illustrates both points of respondents' position: the issue presented is very narrow, and the principles for resolving that issue are well-established in this Court's prior decisions.

II.

As the Court held last year, the purpose of the Wagner Act was to remedy "[t]he inequality of bargaining power between employees who do not possess . . . actual liberty of contract, and employers who are organized in corporate or other forms of organization." *Metropolitan Life Ins. Co.* v *Massachusetts*, ___ U.S. ___, 85 LEd 2d 728, 749 (1985) [quoting 29 USC § 151].

Consistent with that purpose, the Court in the early years of the Wagner Act, twice struck down employers' attempts to use individual contracts as a means to avoid reaching a collective agreement. *National Licorice* v *NLRB*, 309 US 350 (1939); *J. I. Case* v *NLRB*, *supra*. In those cases, the Court carefully noted that an employer could not use collective bargaining as an excuse to unilaterally void whatever individual contract rights which employees might have obtained. *Id.* Insofar as petitioners now argue that respondents had forfeited their right to enforce individual contracts when they selected a bargaining representative (Pet. at 8-9), that argument is foreclosed by these two seminal decisions of this Court.

In particular, in *National Licorice*, *supra*, the National Labor Relations Board had struck down the employer's attempt to use individual contracts as a shield against collective negotiations. As a remedy, the Board ordered

all such contracts voided. While affirming the basic Board decision, the Court very carefully noted the continuing role of individual employment contracts in industries covered by the NLRA and modified the Board's order so as not to ". . . foreclose the employees from taking any action to secure an adjudication upon the [individual] contracts . . ." *National Licorice* v *NLRB, supra,* 309 U.S. at 365.

Four years later, in an opinion by Justice Jackson, the Court unanimously reaffirmed the continuing validity of individual employment contracts in the absence of a collective bargaining agreement. *J. I. Case* v *NLRB,* 321 U.S. 332 (1943). As Justice Jackson was an early architect of the preemption doctrine,[4] the courts below quite properly paid special attention to his words:

> "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, *not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment,* because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue to work after a collective bargaining agreement expires and, despite negotiations in good faith, *the negotiations may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern." J. I. Case* v *NLRB, supra,* 321 U.S. at 336-337 (emphasis added).

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[4] *See Garner* v *Teamsters,* 346 U.S. 485 (1953).

Only three years ago, this Court relied extensively on Justice Jackson's opinion in *J. I. Case* to reaffirm the continuing vitality of individual employment contracts in industries covered by the NLRA and to reject the argument that the NLRA created some privilege to unilaterally void such contracts. *Belknap* v *Hale*, 463 U.S. 491, 500, 506-507, 511-512 (1983). In *Belknap*, as here, the employer sought to avoid state court jurisdiction by claiming that state breach of contract suits would "upset the delicate balance of forces established by federal law" and should therefore be preempted under *Machinists* v *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). In *Belknap*, as here, the employer claimed that it should be allowed to use its "economic weapons" free from any restraint imposed by its prior promises.

The *Belknap* Court found "mystifying" the employer's argument that state law should not "burden" the employer's "economic weapons" by enforcing the employer's otherwise valid promises. *Belknap* v *Hale*, *supra*, 463 U.S. at 500. While *Belknap* involved different plaintiffs and a different "economic weapon" (economic replacements), the employer here is advancing precisely the same argument and the result is equally mystifying. The employer seeks to convert an act designed to assure employees "actual liberty of contract" into a license for an employer to unilaterally breach its own voluntary, pre-existing contracts with employees.

Petitioners attempt to justify this perverse result by suggesting that the employer's claimed right to unilaterally implement an offer contravening pre-existing individual contracts derives, somehow, from the Taft-Hartley Act. (*See* Pet. at 5, 12) But this is not the case, for the employer's right to take unilateral action was recognized well before Taft-Hartley. *See, e.g., H. J. Heinz* v *Labor Board*, 311 U.S. 514, 525-526 (1941); *NLRB* v *Sands*,

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306 U.S. 332 (1939); *NLRB* v *Jones & Laughlin*, 301 U.S. 1, 45 (1936). As the trial court held, the employer's right to take unilateral action derived from neither the Wagner Act nor Taft-Hartley:

> ". . . although the employer's right to implement unilaterally his last good faith offer may be somewhat curtailed by the operation of Section 8 of the NLRA, see, *BiRite Foods, Inc.*, 147 NLRB 59 (1963), yet his right to do so essentially emanates from the common law, entrepreneurial right of an employer to run his business." A.37.

As such, the common-law right of the employer is limited by the common-law rights of employees:

> "As such, the employer's common law right to implement unilaterally his last good faith offer must be seen as being also limited by an employee's common law right to enforce his contract of employment. Disputes regarding such common law rights of employers and employees ought to be and traditionally have been resolved in State courts." A.37.

The plaintiffs here claim that years and, in some cases, decades before the certification of a collective bargaining representative, the Auto Club voluntarily entered into certain contractual commitments with them. As this Court stated in *National Licorice, J. I. Case* and *Belknap*, the employer may not convert the NLRA into a means for unilaterally voiding those pre-existing contractual commitments. There is no need now for this Court to reconsider those very sound decisions, especially in view of the fact that the precise issue presented here has not arisen before and is unlikely to arise elsewhere again.

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CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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No. 85-1731 (6)

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners.

v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS and CARL KOLP, On Behalf Of Themselves And On Behalf Of The Class Of All Sales Representatives Of The Defendants in the Counties of Wayne, Macomb and Oakland,

Respondents.

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6 pp

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Respondents.

REPLY TO BRIEF IN OPPOSITION

Respondents' contend (br., p. 3) that certiorari should be denied because the issue here is "exceedingly narrow" and prior decisions of this Court have "definitively repudiated" petitioners' position. Neither argument is correct.

1. The question presented addresses the effect of the preemption doctrine on what has been rightfully termed "the single most important development in the whole field of labor

law during the past decade."[1] Until very recently, most state courts held that, with few exceptions, private employees could be discharged for any reason or even no reason. Currently, however, in some thirty jurisdictions, this employment at will doctrine has been significantly eroded as the result of state court decisions granting private sector employees protection against unjust discipline under state contract and/or tort law.[2] The magnitude of this change is immense. The sixty million private sector employees who are not covered by collective bargaining agreements[3]—particularly the three million employees discharged for non-economic reasons each year[4]—now have recourse to state courts when they believe that disciplinary or other employer action is unfair. Many of those employees, like the present plaintiffs, have asserted in state court that such action violates implied individual employment contracts.[5]

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[1] *Continuing Modification of Employment-At-Will Doctrine*, 120 LRR 29 (BNA, Sept. 9, 1985), quoting University of Michigan Law School Professor Theodore St. Antoine. *See*, to the same effect, Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 Bus. Law. 1 (Nov. 1984); Baxter and Wohl, *Wrongful Termination Lawsuits: The Employers Finally Win a Few*, 10 Empl. Rel. L.J. 258 (Autumn 1984) ("The emerging doctrine of 'wrongful termination' has been the volatile issue in employment law in recent years"); Sumners, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 Fordham L. Rev. 1082 (May 1984) ("One of the potentially significant developments in American labor law in the past decade is the unheralded reemergence of the individual contract of employment as a central legal concept").

[2] *Continuing Modification of Employment-At-Will Doctrine*, *supra*, n. 1, at 30.

[3] *Legislative Proposal On Employment-At-Will Issue*, 115 LRR 44, 45 (BNA, Jan. 16, 1984), quoting outgoing Industrial Relations Research Association President Professor Jack Stieber.

[4] *Id.* at 44.

[5] At least twenty-seven states now recognize the concept of an implied employment contract arising out of, for example, oral statements by an employer representative, an employer document such as an employee handbook, or a pattern of employer conduct. *See*, McCulloch, Townley & Updike, *Termination of Employment*, ¶ 20001-20076 (1986).

Concomitantly, many of these employees have chosen to be represented by a labor organization: in 1984, for example, the NLRB conducted 5,181 representation elections.[6] In the approximate 47% of the elections where unions were successful,[7] negotiations for a collective bargaining agreement then ensued which, because of "recent changes in the collective bargaining climate," often "produced bitter confrontation between labor and management."[8] Both sides, accordingly, resorted to one or more of the bargaining weapons permitted by federal law—a union engaging in a work stoppage or an employer replacing economic strikers, discontinuing strikers' insurance benefits, contracting out struck work or, as here, unilaterally changing employment terms after a good faith impasse. See Pet. for Cert., p. 9.

This case addresses the conflict between these two significant labor trends. It is a recurrent and far-reaching conflict. The issue presented, therefore, is neither "unusual" nor "extraordinary" (br. in opp., p. 4). It is a national problem which, as demonstrated in the petition and supporting *amicus* brief of the United States Chamber of Commerce, will continue to cause both a divergence in federal bargaining rights from state to state and an impermissible state intrusion upon federal labor law.

2. The widespread and recurrent nature of the question presented is also demonstrated by the recent decisions of the Fifth, Sixth and Seventh Circuits discussed in petitioners' supplemental briefs. Contrary to the principles espoused by the court below, those courts held that state or other remedies must yield to the rights and obligations conferred by the National

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[6] *NLRB General Counsel's Summary of Operations for FY 1984*, 118 LRR 121, 123 (BNA, Feb. 18, 1985).

[7] *See*, e.g., NLRB, *NLRB Election Report (Oct. 1984-Mar. 1985)*, ER-280 (Aug. 15, 1985).

[8] *Innovative Approach to Collective Bargaining*, 115 LRR 141 (BNA, Feb. 20, 1984).

Labor Relations Act whether they be the right to unilaterally implement a final offer after a bargaining impasse (*National Metalcrafters, Division of Keystone* v. *McNeil,* 784 F.2d 817 (7th Cir. Feb. 28, 1986)), the obligation to continue to honor existing terms of employment after the expiration of a collective bargaining agreement until there is a bargaining impasse (*U.A. Health and Welfare Education and Pension Funds* v. *Rester Refrigeration Service, Inc.,* ____ F.2d ____, 122 LRRM 2457 (5th Cir. May 23, 1986)), or other action taken pursuant to a collective bargaining relationship (*Serrano* v. *Jones & Laughlin Steel Co.,* ____ F.2d ____, 122 LRRM 2297 (6th Cir. May 8, 1986)).

3. The cases which respondents argue have "definitively repudiated" petitioners' position, *National Licorice* v. *NLRB,* 309 U.S. 350 (1939), and *J.I. Case* v. *NLRB,* 321 U.S. 332 (1943), are not even preemption cases. Moreover, these cases support, not denigrate, the petitioners' contentions. Both cases held that, if employees select a union, their employer may not use pre-union individual contracts to disregard the collective bargaining process. The instant case involves the converse, equally compelling situation: an attempt by employees to use pre-union individual contracts to obviate the bargaining process they have selected. In addition, both cases expressly left unanswered the question of enforceability of the individual contracts.[9] The issue presented was similarly left unresolved by *Belknap* v. *Hale,* 463 U.S. 491, 500 (1983), where, unlike the present case, the plaintiffs were "innocent third parties" who were remediless under federal law.[10] See Pet. for Cert., p. 13.

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[9] In *National Licorice,* the Court stated (309 U.S. at 365): "[w]e do not now consider their [the contracts] nature and extent." In *J.I. Case,* the Court stated (321 U.S. at 336-37): "express or implied individual agreements *may* be held to govern" during the pendency of negotiations (emphasis added). *See* Pet. for Cert., p. 12.

[10] The state enforcement of individual contracts in *Belknap* complemented, rather than frustrated, the federal process. *See* Pet.

Footnote continued on following page.

For the foregoing reasons, and the reasons stated in the petition and supplemental briefs, the petition for writ of certiorari should be granted.

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Footnote continued from preceding page.

for Cert., p. 13 n. 15. Enforcement of the individual contracts in *J.D. Alexander* v. *Standard Oil Co.*, 53 Ill. App. 3d 690, 368 N.E.2d 1010 (5th Dist. 1977), a case respondents describe as "related to the questions presented here" (br., p. 5), also complemented the federal process since the employer there, by specifically agreeing at the bargaining table to maintain certain individual agreements, thereby relinquished any right to make changes after the expiration of the collective bargaining agreement.

Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

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v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, on behalf of themselves and the class of all sales representatives of the Petitioners in the counties of Wayne, Macomb and Oakland, *Respondents.*

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

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CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, on behalf of themselves and the class of all sales representatives of the Petitioners in the counties of Wayne, Macomb and Oakland, *Respondents.*

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

With the consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Peti-

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[1] The consent letters of both counsel have been filed with the Clerk of the Court.

tioners. The Chamber is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on labor relations matters before the courts. Toward this end, the Chamber has filed *amicus curiae* briefs in this Court in a number of labor relations cases, including the two labor preemption cases the Court ruled on this term.[2] The Chamber also previously brought suit successfully challenging the New Jersey Strikebreakers Act as preempted by the National Labor Relations Act.[3]

The case at bar illustrates a recurring conflict between individual employment contract rights arising under state law and collective bargaining rights governed by federal law. The Petitioner asks the Court to examine the accommodation federal law mandates between these rights, and decide whether Michigan common law creating individual implied contract rights can be invoked where its application prevents the exercise of a bargaining option—unilateral implementation after good faith impasse—that is legitimate under federal labor law.

Many Chamber members have collective bargaining relationships with unions. It is of vital concern to these businesses that the ground rules for negotiating be clear and uniform. If individual union members can assert state law claims to collaterally attack valid bargaining tactics, the federal ground rules will be thrown into dis-

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[2] *Colden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. 1395 (1986); *Wisconsin Department of Labor & Industry* v. *Gould Inc.*, 106 S. Ct. 1057 (1986).

[3] *United States Chamber of Commerce* v. *State of New Jersey*, 89 N.J. 131, 445 A.2d 353 (1982).

array, and the laissez-faire zone of conduct which Congress intended to be controlled by the free play of economic forces will be vitiated. Moreover, allowing such claims would create an influx of litigation by unionized employees over implied contracts and employment-at-will exceptions similar to the current flood of such suits by non-union employees.[4] It is crucial for the Court to make clear that the collective bargaining relationship is governed exclusively by federal labor law, and that such state claims are preempted by the National Labor Relations Act. Because the Chamber is in a unique position to make the Court aware of the pervasive impact on the business community of these important issues, it submits this brief and urges the Court to grant *certiorari*.

STATEMENT OF THE CASE[5]

This case arises from a lawsuit brought by seven discharged sales representatives against their former employers, five corporations acting under the umbrella of the Automobile Club of Michigan (collectively "the Club"). The workers asserted, pursuant to Michigan common law, that the Club had breached an implied contract not to terminate them without just cause,[6] which allegedly was created prior to the certification of a

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[4] *See generally Evangelista* v. *Inlandboatmen's Union*, 777 F.2d 1390, 1401 (9th Cir. 1985) ("[Plaintiff] claims that her demotion in seniority violates the state's 'important interest in protecting its citizens from harassment on the job.' Were Evangelista correct, virtually every wrongful discharge action would be exempt from preemption, a result which the Supreme Court indicated that it did not embrace."); *Costello* v. *United Parcel Service, Inc.*, 617 F. Supp. 123, 126 (E.D. Pa. 1984), *aff'd mem.*, 774 F.2d 1150 (3d Cir. 1985) ("[t]here is at least an arguable 'public policy' component in most discharge decisions").

[5] As the Petitioner has set forth the factual background in detail, only a brief summary is presented here.

[6] Other aspects of the workers' claims are not addressed here.

union.[7] The Club had discharged the workers for failure to meet sales requirements it had implemented unilaterally after bargaining to impasse with the Union.[8]

The Club argued that the suit was preempted by the National Labor Relations Act, as it had exercised a valid bargaining option, a peaceful economic weapon, which could not be attacked collaterally under state contract law. The Michigan courts rejected this argument and allowed the action to proceed. The Michigan Court of Appeals stated that the question presented in state court was different from that which would have been presented to the National Labor Relations Board, and ruled that an employer's "common law right to implement its final offer" is "limited by [its] common law duty to honor its contracts of employment." Pet. App. at 12a, 15a. The Michigan Supreme Court denied the Club's application for leave to appeal, Pet. App. at 1a, and the instant Petition followed.

ARGUMENT

The interaction between individual contract rights under state law and federal collective bargaining rights has assumed increasing importance since this Court's last discussion of the issue in *J.I. Case* v. *NLRB*, 321 U.S. 332 (1944). Considerable change in the law governing employment rights has occurred on both the state and federal levels. A number of different state law causes of action have developed for wrongful discharge, breach

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[7] The Club's employees elected the Michigan AAA Sales Association ("the Union") as their exclusive bargaining representative in February, 1978. *See* Opinion of the Michigan Court of Appeals, 138 Mich. App. 488 (Nov. 5, 1984), reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") 3a, at 6a.

[8] The Club made its final offer in July, 1981 after numerous unsuccessful negotiating sessions. When the Union rejected this offer, the Club declared an impasse and implemented the terms reflected in the offer, including minimum production standards for sales representatives. *Id.* at 6a-7a.

of implied contract, and breach of the covenant of good faith and fair dealing, eroding the traditional employment-at-will doctrine.[9] At the same time, in the collective bargaining arena, recognition has evolved that exercising pressure tactics to induce compromise, including unilaterally changing employment terms after impasse, is a legitimate option under the federal labor statutes. These two evolving areas of law have clashed in the instant case, and present to the Court the vital need for clarification of their appropriate accommodation.

I. THE MICHIGAN COURT'S DECISION ALLOWS INDIVIDUAL CONTRACT RIGHTS UNDER STATE LAW TO SUPERSEDE FEDERAL COLLECTIVE BARGAINING RIGHTS, OPENING THE DOOR TO WHOLESALE STATE INTERFERENCE WITH COLLECTIVE BARGAINING.

The court below held that the exercise of valid collective bargaining options is subject to restriction by state common law principles, and called this restriction "an appropriate accommodation of the parties' rights." Pet. App. at 15a. This conclusion imposes substantial limitations on federally regulated bargaining options, and has serious implications for national labor policy.

As this Court has recognized, *Congress* struck the "balance . . . between the conflicting interests of the union, the employees, the employer and the community," and this balance included allowing the use of legitimate "weapon[s] of self-help." *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 259 (1964).[10] The National Labor

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[9] The dramatic outgrowth in this area of law has been discussed by numerous commentators. *See, e.g.*, Stieber, *Recent Developments in Employment at Will*, 36 Lab. L.J. 557, 559-60 (1985); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law. 1 (1984).

[10] *See also Golden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. 1395, 1399 (1986) ("Congress' decision to prohibit certain

Relations Act ("the Act") requires parties to bargain in good faith, but leaves them free to agree or not to agree, and to use or decline to use legitimate pressure tactics as a method to reach agreement.[11] As the Court stated in *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477, 489 (1960):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other incline to agree on one's terms—exist side by side.

Accordingly, state regulation in the labor area "concerning conduct that Congress intended to be unregulated," [12] including "[r]esort to economic weapons should more peaceful measures not avail," [13] is prohibited under what has become known as the *Machinists* [14] preemption

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forms of economic pressure while leaving others unregulated represents an intentional balance 'between the uncontrolled power of management and labor to further their respective interests' ") (citations omitted).

[11] Unilateral implementation of an employer's final offer after bargaining impasse is one such tactic, and is a legitimate component of the bargaining process, so long as the employer has bargained in good faith to impasse. *See, e.g., NLRB* v. *Katz*, 369 U.S. 736, 745 and n.12 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224 (1949); *Western Newspaper Publishing Co.*, 269 N.L.R.B. 355 (1984); *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom. American Federation of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[12] *Golden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. at 1398, *quoting Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S. Ct. 2380, 2394 (1985).

[13] *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 317 (1965).

[14] *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relation Comm'n*, 427 U.S. 132 (1976).

doctrine. *See Golden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. 1398-99; *Machinists*, 427 U.S. at 147; *Morton*, 377 U.S. at 259. States may not impose their own unique common law restrictions in a manner which, as here, interferes with the federal scheme. Far from adopting an appropriation that would allow such interference, as suggested by the court below,[15] the Court in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), examined actions that were *not* bargaining tactics (the employer had discharged strike replacements after promising that they would not be discharged), and concluded that "the normal rules of law" govern the relationship between employers and "innocent third parties." 463 U.S. at 500.

In contrast, the NLRA alone governs the bargaining relationship between parties to a labor dispute. Allowing collateral state regulation, even indirectly, would have an enormously disruptive effect on the bargaining process and the federal regulatory scheme. For example, in this case, state recognition and enforcement of the alleged implied contracts would, in effect, bar the Club from implementing its desired production standards. If the impasse continued over an extended period, the workers' terms of employment would be governed by state law during that time, yet the employer would be precluded by federal law from negotiating with the individual employees.

Thus, even state regulation which does not govern the labor negotiation process directly may in application result in the precise type of interference prohibited by *Machinists*, that which "frustrate[s] effective implementation of the Act's processes." 427 U.S. at 147-48, *quoting Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969). The Court should reiterate that while such state regulation is not

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[15] *See* Pet. App. at 15a.

preempted entirely, it may not be invoked or applied where it results in this type of disruption.

Another aspect of the Michigan court's holding threatens to create an imbalance in the federal/state framework of employment rights. The court held, based on *J.I. Case* v. *NLRB*, 321 U.S. 332, that individual contract rights are not extinguished until the parties enter into a valid collective bargaining agreement. Pet. App. at 17a. This conclusion is not only incompatible with labor law principles, but would generate wholesale state regulation of the negotiation process. Under this broad rule, most employers' pre-agreement bargaining options would be foreclosed, because exercising them would give rise to state law causes of action under various contract and tort theories. This certainly was not the result contemplated by Congress. If *J.I. Case's* dicta can be read to have created such a rule, the Court now should clarify that such a reading is erroneous.

J.I. Case established that individual contracts may not be availed of to defeat the Act's processes. 321 U.S. at 337. Extending that decision to support the proposition that individual contract rights are extinguished only when a collective agreement is entered would wreak havoc on the collective bargaining process. In recent years, the states have accorded employees broad individual implied contract rights. *See* n.9, *supra.* The Court should clarify that the results of collective bargaining, whether a contract, an impasse,[16] a strike, or a lockout, supersede such individual rights. As the Court stated in *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967), national labor policy "extinguishes the individual employee's power to order his own relations with his em-

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[16] *See Morio* v. *North American Soccer League*, 501 F. Supp. 633, 639 (S.D.N.Y.), *aff'd*, 632 F.2d 217 (2d Cir. 1980) (individual contract rights must be maintained "unless and until an agreement *or a good faith impasse* is reached through bargaining with the Union" (emphasis added)).

ployer and creates a power vested in the chosen representative to act in the interests of all employees."

II. THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE THE WIDESPREAD CONFUSION ABOUT THE SCOPE OF *GARMON* PREEMPTION.

The Chamber submits that *Machinists* preemption precludes Respondents' state law claims. Moreover, the decision below reflects the confusion that exists among the lower courts about the application of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny, and accentuates the urgent need for this Court to clarify the import of those decisions.

"*Garmon*" preemption protects the federal scheme of labor regulation and the exclusive jurisdiction of the National Labor Relations Board ("the Board") by preventing states from regulating or providing remedies for conduct arguably governed by the Act. As the rule originally was articulated: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." 359 U.S. at 245. The *Garmon* Court focused on the "activities which [the] State purports to regulate," and concluded: "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244.

However, the Court's discussion of *Garmon* preemption in several subsequent cases has created confusion as to the appropriate inquiry to be made before holding a state claim preempted. In *Farmer* v. *United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 297, 302 (1977), the Court stated that the *Garmon* rule should not be applied mechanically, but rather, "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme" must be

examined. The *Farmer* Court examined the *focus* of the state court action, and determined that its adjudication in that case would not necessitate resolving the merits of the underlying labor dispute. *Id.* at 304-05. Thus, the Court concluded that the state law claim was not preempted, but reiterated that "state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." *Id.* at 305.

The following term, in *Sears Roebuck & Co.* v. *San Diego District Council of Carpenters*, 436 U.S. 180, 197 (1978), the Court repeated its emphasis on the *focus* of the dispute, holding that it must examine the controversy presented to the state court and the controversy that could be presented to the Board, and determine whether they are *identical.* A state court's exercise of jurisdiction was held to create a risk of interference with the unfair labor practice jurisdiction of the Board only when these controversies are identical. The Court subsequently repeated this rationale in *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. at 681, and *Belknap, Inc.* v. *Hale*, 463 U.S. at 510.[17]

The lower courts have responded with confusion to the Court's narrow focus on the identity of the controversies before the Board and the court, unsure of where the factor of threatened interference with the federal scheme fits in. The Fifth Circuit has held state law contract and wrongful discharge claims preempted under *Garmon*, noting that the holdings in *Belknap, Sears* and *Farmer* leave

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[17] Of course, in *Belknap*, the rights at stake were those of workers who were not parties to the bargaining dispute and had no access to Board remedies. *See* discussion at p. 7, *supra.* The Court later noted the importance of this distinction in *Golden State*, 106 S. Ct. at 1400 n.7, stating: "There is no issue here that, rather than regulating the relationship between the employer and the union, the city's action protected innocent third parties from the employer. *See Belknap* . . . ."

the limits of *Garmon* preemption "unsettled." *Gray* v. *Local 714, International Union of Operating Engineers*, 778 F.2d 1087, 1090 n.2 (5th Cir. 1985). The Ninth Circuit has cited *Farmer* in support of its holding that a former union member's state tort claims for breach of the covenant of good faith and fair dealing, wrongful interference with a business relationship, intentional infliction of emotional distress, and constructive discharge were preempted by federal labor law, as they "*arose out of the same acts and conduct* which forms the basis of [plaintiff's] section 301/breach of duty claims." *Carter* v. *Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985) (emphasis added). The Ninth Circuit also has held preempted a union's claims of tortious interference with a prospective contractual relationship, stating that under *Garmon*, the Board has "exclusive jurisdiction over *activities that threaten to interfere with national labor policy*." *Lumber Production Industrial Workers Local 1054* v. *West Coast Industrial Relations Ass'n*, 775 F.2d 1042, 1045 (9th Cir. 1985) (emphasis added).[18]

In contrast, the Michigan court below held that since the Board would not determine whether the Club's actions constituted a breach of the workers' individual employment contracts, the *Garmon* doctrine was inapplicable and the state law claims could proceed. Pet. App. at 12a. The Michigan court simply ignored the admonition in *Jones* that the *Garmon* doctrine requires "the substantive preemption by the federal labor law in the areas to which it applies." 460 U.S. at 680.

It is evident that the lower courts are unsure about how to apply *Garmon* preemption, and need instruction

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[18] *See also Serrano* v. *Jones & Laughlin Steel Co.*, 99 Daily Lab. Rep. (BNA) D-1, D-4, D-5 (6th Cir. May 8, 1986) (court held state law fraud claims preempted under *Garmon*, declaring: "No matter how it is stated, the gravamen of the three fraud charges is that [the company] did not bargain in good faith . . ." and "[t]his [fraud] claim . . . implicates a section 8(d) duty").

from this Court. It is clear that the Act does not preempt all state regulation of the terms and conditions of employment.[19] It is likewise clear that a state law claim is preempted if it presents to a state court the *same* issue that could be presented to the Board. The Court should clarify that state law claims which present a different controversy in state court, but whose resolution creates a threat of undue interference with the federal regulatory scheme, are preempted.[20]

The Chamber submits that there is a real threat that maintenance of a state court action here will impair the Board's function. While a state court's focus on the elements of breach of implied contract would differ from the Board's focus on the elements of good faith bargaining and bona fide impasse, a state court determination that a contract right exists and damages are warranted

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[19] *See Malone* v. *White Motor Corp.*, 435 U.S. 497, 504-05 (1978) ("there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining"). *Accord, Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1912 n.7 (1985).

[20] The Court also should clarify the weight to be given in the preemption analysis to the remedies sought by the party. At least one circuit has discussed this factor. *See Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359, 364 (5th Cir.), *cert. denied*, 105 S. Ct. 433 (1984) ("[t]he *Belknap* plaintiffs, for example, did not seek a remedy that, had it been awarded by a state court, would have encroached on the function of the National Labor Relations Board, because the Board could not have granted any relief to the plaintiffs"); *see also Costello* v. *United Parcel Service*, 617 F. Supp. at 126 ("[w]hile this may be true [that punitive damages are not available in the collective bargaining context], I am not convinced that this additional remedy is of sufficient import to tip the balance"). *But see Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981), *quoting Garmon*, 359 U.S. at 247 ("That the state-court suit [in *Garmon*] was one for damages rather than for the type of relief available from the NLRB weighed against preemption, not in favor of it. . . . 'to allow the State to grant a remedy here which has been withheld from the NLRB only accentuates the danger of conflict.'").

as a result of the Club's use of a legitimate bargaining option would critically impair federal regulation of the collective bargaining process. Where, as here, actions are undertaken pursuant to the federal structure of bargaining, it is exclusively the Board's function to review the propriety of the conduct and, if necessary, provide a remedy. State laws may not be applied, nor may state law claims be allowed to proceed, if they interfere with this scheme.

CONCLUSION

The Chamber submits that the decision below will have a destructive effect on the federal scheme of collective bargaining regulation and create dangerous avenues for state law challenges of collective bargaining results. For these reasons, the Chamber urges the Court to grant review.

Respectfully submitted,

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June 1986